136-581

136-581

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~482~~. 214

CARLILE MASON AND JOHN ALSTON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 492.

CARLILE MASON AND JOHN ALSTON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Summons	2	1
Marshal's return	3	2
Declaration	5	3
Order extending time to plead	15	7
" " "	16	7
Pleas of John McArthur	17	8
Copy of account claimed in 16th, or last plea	42	19
Pleas of Charles Hopkinson *et al.*	45	20
Copy of account claimed in set-off	78	34
Contract between U. S. and John McArthur, Dec. 10, 1875	81	36
" " " " " " "	89	40
Similitur to 1st plea and demurrer to residue of pleas of Hopkinson *et al.*	99	44
Similitur to 1st, 6th, 7th, and 8th pleas, and demurrer to residue of pleas of John McArthur	102	45
Joinder in demurrer by John McArthur	104	46
Joinder in demurrer by Hopkinson *et al.*	106	46
Hearing of demurrer of Hopkinson *et al.*	107	47
Hearing of demurrers	108	47
Order on demurrers	109	48
Amended 4th and 5th pleas of John McArthur	111	48
Replications to pleas of John McArthur	113	49

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 29, 1889.

	Original.	Print.
Replication to plea of Hopkinson *et al.*	115	50
Order for continuance	116	50
Order granting leave to amend declaration	117	50
Order for continuance	118	51
Trial commenced	119	51
Verdict	122	52
Order taking motion for new trial under advisement, &c.	124	53
Judgment	126	53
Bill of exceptions	130	55
Certified copy of bond	130	55
Statement of money order accounts	138	59
Testimony of Frank W. Palmer	140	60
Authenticated copy of certificate	142	60
Testimony of Augustus H. Burley	144	61
John McArthur	146	62
Letter from P. O. Dept. to John McArthur, June 14, 1873	148	63
Letter of John McArthur to F. W. Palmer, April 25, 1877	150	63
Letter of Goudy, Chandler and Skinner to 6th Auditor, June 19, 1878	152	64
Letter of 6th Auditor to Goudy, Chandler and Skinner, June 27, 1878	159	67
Testimony of David M. Ford	161	68
John McArthur (recalled)	162	68
Charge to jury	164	69
Motion for new trial	168	70
Bond	172	71
Clerk's certificate	174	72
Writ of error	175	73
Citation	176	73
Proof of service of citation	177	74

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, circuit judge of the United States for the seventh judicial circuit, on Wednesday, the fourteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA *vs.* JOHN MCARTHUR, CARLILE MASON, JOHN ALSTON, James Steele, Thomas S. Dobbins, and Solomon McKichan, Impleaded, &c.	15205.	Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-sixth day of November, 1877, there issued out of the clerk's office of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a writ of summons in said above-entitled cause; which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

2 CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon John McArthur, Rosell M. Hough, Carlisle Mason, Solomon McKichan, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto the United States of America in a plea of debt for three hundred thousand dollars, to their damage, as it is alleged, of one hundred thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 26th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the 102nd year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[Endorsed:] Term No. —. Gen. No. —. Circuit court of the United States, northern district of Illinois. —— —— *vs.* —— ——. Summons. Returnable — term, A. D. 188–. —— ——, clerk. Filed —— —, A. D. 188–. —— ——, clerk. —— ——, attorney.

3 *Special Deputy's Return.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Know all men by these presents that I have appointed and by these presents do appoint C. W. Wolbert my true and lawful deputy to execute the annexed writ, United States of America *vs.* John McArthur *et al.*, and to make return of the execution thereof according to law.

JESSE S. HILDRUP, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of John McArthur, therein named, on the 7th day of December, A. D. 1877, and of Carlisle Mason, therein named, on the 30th day of November, A. D. 1877, and of Solomon McKichan, therein named, on the 28th day of November, A. D. 1877, and of Thomas S. Dobbins, therein named, on the 1st day of December, A. D. 1877, and of Charles Hopkinson, therein named, on the 30th day of November, A. D. 1877.

I did not serve Rosell M. Hough, John Alston, and James Steel, the other defendants therein named, being unable to find them within my district.

JESSE S. HILDRUP,
United States Marshal,
By C. W. WOLBERT.

Marshal's fees:

— copies	$
15 miles	90
5 services	10 00
Oath and certificate of service	
	$10 90

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

C. W. Wolbert, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

C. W. WOLBERT.

Subscribed and sworn to before me this 17th day of December, A. D. 1887.

[SEAL.] JAMES H. PADDOCK,
Notary Public.

(Endorsed:) Filed December 17, 1877. Wm. H. Bradley, cl'k.

4 Afterwards, to wit, on the seventh day of December, 1877, came the plaintiff, by its attorney, and filed in said clerk's office its declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

5 In the Circuit Court of the United States for the Northern District of Illinois, of the December Term, in the year 1877.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

The United States of America, plaintiffs, by Mark Bangs, their attorney for the northern district of Illinois, complain of John McArthur, Rosell M. Hough, Carlisle Mason, Solomon McKichan, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, defendants, of a plea that they render unto the said plaintiffs the sum of three hundred thousand dollars, which the said defendants owe to and unjustly detain from the said plaintiffs; for that whereas the said defendants (together with one Oramel S. Hough, since deceased), on the 10th day of January, in the year eighteen hundred and seventy-three, at the city of Chicago, in the district aforesaid, by their writing obligatory, bearing date of that day and now to the court here shown, acknowledged themselves to be held and firmly bound, jointly & severally, unto the said plaintiffs in the sum of three hundred thousand dollars, above demanded, to be paid to the said plaintiffs; which said writing obligatory and a certain condition thereunder written were and are in the words
6 and figures following, to wit:

Know all men by these presents that we, John McArthur, of of Chicago, in the county of Cook, and State of Illinois, and Rosell M. Hough, Carlisle Mason, Solomon McKichan, John Alston, James Steel, Oramel S. Hough, Thomas S. Dobbins, Charles Hopkinson, all of the city of Chicago, county of Cook and State of Illinois, are held and firmly bound unto the United States of America in the just and full sum of ($300,000) three hundred thousand dollars; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof we have hereunto subscribed our names and affixed our seals this tenth day of January, in the year of our Lord one thousand eight hundred and seventy-three.

The condition of this obligation is such that whereas the above-bounden John McArthur was appointed deputy postmaster at Chicago aforesaid on the 20th day of December, 1872, which said appointment was, on the 20th day of December, 1872, confirmed by the Senate of the United States:

Now, if the said John McArthur shall well and truly execute the duties of said office according to law and the instructions of
7 the Postmaster General, and faithfully, once in three months or oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department

in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands from postage collected, postage stamps and stamped envelopes sold, or money orders issued by him or from any other source connected with the postal service in the manner prescribed by the Postmaster General of the United States for the time being, and shall keep safely, without loaning, using, depositing in other banks, or exchanging for other funds than as allowed by law, all the public money collected by him or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment are received shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General, and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, mail keys, and other property and papers which he, as postmaster or as agent and
8 depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department, then the above obligation shall be void; otherwise of force. And it is hereby expressly agreed and stipulated that in case the said John McArthur, postmaster, shall during his term of office execute a new bond with different sureties all the parties to the above obligation shall be held and bound for all charges against the said postmaster up to the end of the quarter during which such new bond shall be executed; and the acceptance of such new bond, whenever the same may be signified by the Postmaster General, shall date from the last day of such quarter.

JOHN McARTHUR. [L. S.]
ROSELL M. HOUGH. [L. S.]
CARLISLE MASON. [L. S.]
SOLOMON McKICHAN. [L. S.]
JOHN ALSTON. [L. S.]
JAMES STEEL. [L. S.]
ORAMEL S. HOUGH. [L. S.]
THOMAS S. DOBBINS. [L. S.]
CHARLES HOPKINSON. [L. S.]

Witness:
WM. T. HUGHES.
P. A. HOYNE.

And the said John McArthur having been appointed to the office of deputy postmaster at Chicago aforesaid, and the said appointment having been confirmed by the Senate of the United States, as in the said condition recited, he, the said John McArthur, thereupon, to wit, on the said tenth day of January, in the year 1873, at
9 Chicago aforesaid, in the district aforesaid, entered upon the duties of the said office and became and thenceforth for a long space of time was such deputy postmaster as aforesaid; yet the

said John McArthur has not kept or performed the said condition of the said writing obligatory, but has neglected and failed so to do, to the injury of the said plaintiffs.

And, for assigning a breach of the said condition, the said plaintiffs say that heretofore, to wit, on the seventeenth day of April, in the year eighteen hundred and seventy-seven, at Chicago aforesaid, there was in the hands of the said John McArthur a large sum of money, to wit, the sum of fifty-two thousand one hundred and twenty-three dollars and seventy-four cents, the same being a balance of moneys which had come to his hands as such deputy postmaster from postage collected and postage stamps and stamped envelopes sold by him, and from other sources connected with the postal service of the said United States while he was such deputy postmaster as aforesaid, and that he, the said John McArthur, did not nor would then or afterwards in any manner pay to or for the said United States the balance of moneys aforesaid or any part thereof, although he was then and there requested to pay the same and although the manner of paying the same had been prescribed by the Postmaster General of the said United States for the time
10 being, whereof he, the said John McArthur, then and there had notice.

And, for assigning a further breach of the said condition, the said plaintiffs say that heretofore, to wit, on the twenty-seventh day of October, in the same year, 1877, at Chicago aforesaid, there was in the hands of the said John McArthur a certain other large sum of money, to wit, the sum of eight thousand two hundred and forty-four dollars and seven cents, the same being a balance of moneys which had come to his hands as such deputy postmaster from money orders issued by him, and from other sources connected with the postal service of the said United States and relating to postal money orders while he was such deputy postmaster as aforesaid, and that he, the said John McArthur, did not nor would then or afterwards in any manner pay to or for the said United States the balance of moneys last aforesaid or any part thereof, although he was then and there requested so to do and although the manner of paying the same had been prescribed by the Postmaster General of the said United States for the time being, whereof he, the said John McArthur, then and there had notice.

And, for assigning a further breach of the said condition, the said plaintiffs say that heretofore, to wit, before and on the tenth day of March, in the same year, 1877, at Chicago aforesaid, and while the said John McArthur was such deputy postmaster as aforesaid, there was collected by him and otherwise placed in his possession and
11 custody as such deputy postmaster as aforesaid certain public money, in the whole amounting to a large sum, to wit, the sum of fifty-two thousand one hundred and twenty-three dollars and seventy-four cents, and that afterwards, to wit, on the seventeenth day of April, in the same year, 1877, at Chicago aforesaid, the said John McArthur received an order from the Postmaster General of the said United States to transfer and pay over the same public money to one Frank W. Palmer, then deputy postmaster at Chicago

aforesaid, and that the said John McArthur did not faithfully and promptly make such transfer or payment, but has hitherto neglected and refused so to do.

And, for assigning a further breach of the said condition, the said plaintiffs say that heretofore, to wit, before and on the tenth day of March, in the same year, 1877, at Chicago aforesaid, and while the said John McArthur was such deputy postmaster as aforesaid, there was collected by him and otherwise placed in his possession and custody as such deputy postmaster certain other public money, in the whole amounting to a large sum, to wit, the sum of eight thousand two hundred and forty-four dollars and seven cents; and that afterwards, to wit, on the twenty-seventh day of October, in the same year, 1877, at Chicago aforesaid, the said John McArthur received

12 an order from the Postmaster General of the said United States to transfer and pay over the public money last aforesaid to one Frank W. Palmer, then deputy postmaster at Chicago aforesaid, and that the said John McArthur did not faithfully and promptly make such transfer or payment, but has hitherto neglected and refused so to do.

And, for assigning a further breach of the said condition, the said plaintiffs say that heretofore, to wit, before and on the tenth day of March, in the same year, 1877, at Chicago aforesaid, and while the said John McArthur was such deputy postmaster as aforesaid, there was collected by him and otherwise placed in his possession and custody as such deputy postmaster certain other public money, in the whole amounting to a large sum, to wit, the sum of one hundred thousand dollars, and that the said John McArthur did not keep safely, without using, the public money last aforesaid until the same was ordered by the Postmaster General of the said United States to be transferred or paid out, but, on the contrary, then and there, to wit, on the day last aforesaid, at Chicago aforesaid, used and converted the same to and for his, the said John McArthur's, own purposes before the same was ordered by the said Postmaster General to be transferred or paid out.

And, for assigning a further breach of the said condition, the said plaintiffs say that heretofore, to wit, before and on the tenth day of March, in the same year, 1877, at Chicago aforesaid, and while

13 the said John McArthur was such deputy postmaster as aforesaid, he, the said John McArthur, as such deputy postmaster and as agent and depositary for the Post Office Department of the said United States, received, for the use and benefit of the said Post Office Department, divers moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and other property and papers to a large amount and of great value, to wit, to the amount and of the value of one hundred thousand dollars, for which moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and other property and papers, he, the said John McArthur, ought then and there to have accounted with the said United States; yet the said John McArthur, though thereto then and there requested, did not nor would then or afterwards account for the same with the

said United States, in the manner directed by the Postmaster General of the said United States or in any manner whatsoever, but has hitherto neglected and refused so to do.

By reason of which premises the said writing obligatory has become forfeited, and thereby an action has accrued to the said plaintiffs to demand and have of the said defendants the sum of three hundred thousand dollars above demanded; yet the said defendants, though requested, have not paid to the said plaintiffs that sum of money or any part thereof, but refuse so to do, to the dam-
14 age of the said plaintiffs of one hundred thousand dollars; and therefore they bring this suit, etc.

MARK BANGS,
United States Attorney.

(Endorsed:) Filed Dec'r 7th, 1877. Wm. H. Bradley, cl'k.

15 Afterwards, to wit, on the nineteenth day of December, in the December term of said court, 1877, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

On motion of the defendants, by their attorneys, Ela & Parker, the time for them to plead herein is extended to the first Monday of January next.

16 Afterwards, to wit, on the seventh day of January, 1878, in the December term of said court, 1877, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

On motion of the defendants, by their attorney, and with the consent of the district attorney, the time for the defendants to plead herein is further extended ten days.

Afterwards, to wit, on the seventeenth day of January, 1878, came John McArthur, by his attorney, and filed in said clerk's office his pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

17 In the Circuit Court of the United States for the Northern District of Illinois, of the December Term, A. D. 1877.

UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

JOHN MCARTHUR, Impleaded with ROSELL M. HOUGH, Carlyle Mason, Soloman McKichan, John Alsten, James Steel, Thomas S. Dobbins, & Charles Hopkinson, } Debt.
als.
THE UNITED STATES OF AMERICA.

And the said defendant, John McArthur, by John Borden, his attorney, comes and defends the wrong and injury when, &c., and says that the supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c.

And, for a further plea in this behalf, the said defendant, by leave, &c., says that the said plaintiff ought not to have or maintain its aforesaid action thereof against him, because he says that he does not owe the said sum of money above demanded or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, &c.

18 And, for a further plea in this behalf, the said defendant, as to each count of said declaration and to each breach therein assigned, by leave, &c., says that the said plaintiff ought not to have or maintain its aforesaid action thereof against him, because he says that he does not owe the said sum of money therein above demanded or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to each count of said declaration and to each breach therein assigned, by leave &c., the said defendant says *actio non*, because he says that at the time therein alleged or at any time he did not have in his hands the sum of money therein mentioned or any part thereof nor any balance of moneys which had come to his hands as deputy postmaster and from the sources therein alleged or any of them; of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to each count of said declaration and each breach therein assigned, by leave, &c., the said defendant says *actio non*, because he says that he did pay to said plaintiff the said sum of money which came into his hands as deputy postmaster, as therein alleged, when thereunto requested, and of this the said defendant puts himself upon the country, &c.

19 And, for a further plea in this behalf, as to the sixth or last breach in said declaration assigned, by leave, &c., the said defendant says *actio non*, because he says that at the time therein alleged or at any other time he did not receive, as therein alleged or otherwise, the moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and

other property and papers therein mentioned nor any of them, and of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to the said sixth or last breach in said declaration assigned, by leave, &c., the said defendant says *actio non*, because he says that heretofore and before the bringing of this suit he did account to said plaintiff, in manner as directed by said Postmaster General, for the said moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and other property and papers received by him, the said defendant, as therein alleged, and each of the same and every part thereof, and of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to the fifth or next to the last breach in said declaration assigned, by leave, &c., the said defendant says *actio non*, because he says that he did keep safely, without using, the public money, therein mentioned which came
20 to his possession and custody, as therein alleged, and did not, at the time therein alleged or at any time, use and convert the same or any part thereof to his own purposes, as therein alleged or otherwise, and of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to the said declaration and each count thereof and each breach therein assigned, by leave, &c., the said defendant says *actio non*, because he says that — hath not neglected or failed to keep or perform the condition of said writing obligatory, but hath, on the contrary, kept and performed the same, and of this the said defendant puts himself upon the country, &c.

And, for a further plea in this behalf, as to the second and fourth breaches in said declaration assigned and each of them, by leave, &c., the said defendant says *actio non*, because he says before and at the time the said sum of money thereinabove demanded came to his hands as such deputy postmaster as aforesaid the Cook County National Bank of the City of Chicago, a banking corporation organized and subsisting under the laws of the said United States and located and doing business at the city of Chicago, in said northern district of Illinois, was a depository of public moneys of the United States, designated for that purpose
21 by the Secretary of the Treasury of said United States and so duly acting as such; that as such deputy postmaster said defendant constantly had, in the necessary performance of his duties, large monied transactions, in order to facilitate and carry on which he, as such deputy postmaster, with the approval and sanction of said plaintiff and its postal department, made use of said depository in collecting drafts, remitting money, and keeping on deposit therein as such deputy postmaster said money-order funds and moneys derived from sources relating thereto and above mentioned; that said money- above demanded, before and on the 19th day of January, A. D. 1875, were on deposit in said depository or with it to the credit of this defendant as such deputy postmaster as money-order funds; that at the time last aforesaid, and while said money

was on deposit as money-order funds in or with said depository, and as such public funds and money in the Treasury of said United States, the said Cook County National Bank closed its doors, and, having failed to redeem its circulation as by law required, was thereupon put into liquidation by the proper officer appointed by law for that purpose, whereupon one Augustus H. Burley was duly appointed and qualified as its receiver, and since hath been and is now acting as such; that said money above demanded, ever since said bank was put in liquidation as aforesaid and at the time in
22 said declaration mentioned and ever since, has been in the hands or possession of said plaintiff and not in the hands or possession of this defendant nor in any manner under his direction or control, and that said money above demanded, before and at the time last mentioned and ever since and now, is public money and money in the Treasury of said plaintiff and not otherwise, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, &c.

And, for a further plea in this behalf, as to each of the first and third breaches in said declaration assigned, except the sum of $34,824.04, parcel of the said sum of money therein demanded, by leave, &c., said defendant says *actio non*, because he says that before and at the time that said money came to his hands as deputy postmaster as aforesaid the Cook County National Bank, a banking corporation organized and subsisting under the laws of the United States and located and doing business at the city of Chicago, in said northern district, was a depository of the public moneys of said plaintiff, designated for that purpose by the Secretary of its Treasury, and so duly acting as such; that said defendant as such deputy postmaster constantly had large money transactions in the necessary performance of the duties of his said office, and that the current monthly expenses of his
23 said office were very large, to wit, the sum of thirty thousand dollars and upwards monthly; that, in order to meet the said current expenses of his said office and with the sanction and approval of said plaintiff and its postal department and under the direction of its Postmaster General, he made use of said depository by depositing therein as such deputy postmaster the said money above demanded (excepting the parcel thereof above excepted), being said postal funds or public money above mentioned; that said money above demanded (except as above excepted), before and on the 19th day of January, A. D. 1875, was on deposit in said depository or with it to the credit of said defendant, as such deputy postmaster, as postal funds, and as such required and necessary to meet the current expenses of his said office; that at the time last aforesaid, and while said money was on deposit in or with said depository as aforesaid, and as such was public funds and money in the Treasury of said United States, the said Cook County National Bank closed its doors, and, having failed to redeem its circulation as required by law, was thereupon put into liquidation by the proper officer appointed by law for that purpose, whereupon one Augustus

H. Burley was duly appointed and qualified as its receiver and since hath been and is now acting as such, and that said money above demanded (excepting as above excepted), ever since said bank
24 was put in liquidation as aforesaid and at the time in said count mentioned and ever since, has been and now is in the hands or possession of said plaintiff and not in the hands or possession of this defendant nor in any manner under his direction or control, and that said money above demanded, except as above excepted, at the times last mentioned and now, is money in the Treasury of said plaintiff and not otherwise, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, except as to said sum of thirty-four thousand eight hundred and twenty-four dollars and four cents, parcel of said sum of money above demanded, &c.

And, for a further plea in this behalf, as to the fifth breach in said declaration assigned (except as to the sum of thirty-four thousand eight hundred and twenty-four dollars and four cents, parcel of said sum therein mentioned), by leave, &c., said defendant says *actio non*, because he says that said sum of money therein above demanded (except as above excepted) were [was], at the time in said breach mentioned and ever since and now is, in the hands or possession of said plaintiff and not in the hands or possession of this defendant nor in any manner under his direction or control, and that said
25 money above demanded (except as above excepted), before and at the time in said breach mentioned and ever since, has been and now is money in the Treasury of the said United States and not otherwise, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, except as to said sum of $34,824.04, above excepted, &c.

And, for a further plea in this behalf, by leave, &c., said defendant says *actio non*, because he says that at the time of the commencement of this suit there was due and owing from the said defendant to the said plaintiff upon the said writing obligatory, by virtue of the condition thereof, a certain sum of money, to wit, the sum of $34,824.04; and the defendant further says that the said plaintiff, before and at the time of the commencement of this suit, was and still is indebted to said defendant in a much larger sum of money than the money so due and owing from the said defendant to the said plaintiff upon the said writing obligatory—this is to say, in the sum of one hundred thousand dollars for work and labor, care, diligence, and attendance of the said defendant by him and his servants before that time done, performed, and bestowed in and about the business of the said plaintiff and for said plaintiff and at
26 its request, and for divers materials and other necessary things by the said defendant before that time found and provided and used and applied in and about the said work and labor for the said plaintiff and at its request, and for divers goods, wares, and merchandise sold and delivered by said defendant to the said plaintiff at its like request, and for money by the said defendant be-

fore that time lent and advanced to and paid, laid out, and expended for the said plaintiff and at its like request, and for other money paid to and deposited with the Cook County National Bank of Chicago for said plaintiff at its request, and for other money by the said plaintiff before that time had and received to and for the use of the said defendant and on his account, and for other money due and owing from the said plaintiff to the said defendant for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant and by him forborne for divers long spaces of time before then elapsed, at the like special instance and request of said plaintiff, and for other money due and owing from the said plaintiff to the said defendant upon an account stated between them, and for other money before that time due and owing to the said defendant from the said plaintiff for, on account of, and upon sundry contracts and agreements before then made and entered into between said plaintiff, of the one part, and said defendant, of the other part, which said sum of
27 money so due and owing from the said plaintiff to the said defendant is wholly due and unpaid, and which sum of money and every part and parcel thereof said plaintiff, before the commencement of this suit, declared it would withhold from said defendant (& so hitherto hath done), and further declared it would apply and so intends to apply the same, or such part thereof as it may seem fit to allow or admit to be due and owing to said defendant, upon his said indebtedness to said plaintiff above mentioned, and which said sum of money first in this plea above mentioned and so as aforesaid due and owing from said plaintiff to said defendant as aforesaid, or so much thereof as may be necessary in this behalf, he, the said defendant is ready and willing and offers to set-off and allow against the said sum of money so remaining due and payable by the condition of the said writing obligatory, according to the form of the statute in such case made and provided, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, &c.

"*Copy of the Account Relied upon in the Above Plea.*"

The United States of America to John McArthur, Dr.

For money due upon contract, of date the 10th day of December, A. D. 1875, for the wrought and cast iron work of the United States sub-treasury (old mint
28 building), San Francisco, California, and for delay caused by said United States in change of plan & otherwise	$15,000
For money due upon contract, of date the 10th day of December, 1875, for wrought and cast iron work for the United States court-house and post office at Lincoln, Nebraska, and for delay on same	5,000
For work and labor done and materials furnished	100,000
For goods, wares, and merchandise sold and delivered	100,000

For money had and received paid, laid out, and expended, and for interest	100,000
On account stated	100,000
Total	$100,000

And, for a further plea in this behalf, said defendant, John McArthur, says *actio non*, because he says that he did from time to time and at all times after the making of the said writing obligatory and the said condition thereof well and truly keep and perform all and singular the matters and things in the said condition specified on his part to be kept and performed according to the tenor and effect of the said condition, and did well and truly execute the duties of said office of deputy postmaster according to law and the instructions of the said Postmaster General, and did faithfully, once in three months, as often as thereto required, render accounts of his receipts and expenditures as such deputy postmaster to the said Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and did
29 pay the balance of all moneys which came to his hands from postage collected, postage stamps or stamped envelopes sold, or money orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster General of the United States for the time being, and did keep safely, without loaning, using, depositing in other banks or exchanging for other funds than as allowed by law, all the public money collected by him or otherwise at any time placed in his possession and custody till the same was ordered by said Postmaster General to — transferred or paid out, and when such orders for transfer or payment were received did faithfully and promptly make the same as directed, and did also faithfully do and perform, as agent or depositary for the said Post Office Department, all such acts and things as were required by him by said Postmaster General, and did faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, mail keys, and other property and papers which he (this defendant), as such deputy postmaster or agent, depositary as aforesaid, received for the use or benefit of the said Post Office Department, according to the tenor and effect of said condition.

And this defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have its aforesaid action, &c.

30 And, for a further plea in this —, the said defendant, John McArthur, says *actio non*, because he says that heretofore, to wit, on the 20th day of December, 1872, said defendant was duly appointed deputy postmaster at Chicago; and afterwards, to wit, on the said 20th day of December, 1872, said appointment was confirmed by the Senate of the United States; that as such deputy postmaster said defendant was required to enter into a bond for the faithful discharge of his duties; and this defendant afterwards, to wit, on the 10th day of January, 1873, executed the pretended bond

declared on herein, and that said pretended bond was conditioned as in said declaration alleged.

And this defendant avers that after the execution and delivery of said pretended bond, to wit, on or about the 4th day of June, 1873, and at or about the time of the appointment and establishing at said Chicago of an assistant treasurer of the United States, the Postmaster General for the time being of the United States issued and sent to said defendant as said deputy postmaster at said Chicago a written order or instruction, directing said defendant as such deputy postmaster as aforesaid that, as an assistant treasurer of the United States had been appointed for Chicago, he should thereafter deposit with the said assistant treasurer daily all surplus postal funds received by him as such deputy postmaster, reserving sufficient to pay the current expenses of his (said defendant's) office; that prior to said appointment of an assistant treasurer of the United States at said Chicago said defendant, as such deputy postmaster, had deposited the moneys which had come into his hands as such deputy postmaster, both postal and money-order funds, in the Cook County National Bank, at said Chicago, which bank was a national banking association, designated by the Secretary of the Treasury of the United States, under the laws of the United States, for a depository of public funds, and that when said defendant received said order or instruction from said Postmaster General as aforesaid he commenced, and thereafter and during all the time he held said office continued, to deposit the postal funds received by him as such deputy postmaster with said assistant treasurer, reserving such as were required for the current expenses of his office, as directed by said order, and continued to deposit such of said postal funds as were necessary for the current expenses of his office, together with money and funds, in said Cook County National Bank until said bank suspended, as hereinafter set forth; all of which was well known to said plaintiff and to said Postmaster General and Post Office Department.

31

And this defendant avers that on or about the 19th day of January, 1875, said Cook County National Bank suspended payment, and a receiver was appointed by the Comptroller of the Currency of the United States and took possession of the assets of said bank under the laws of the United States; that said bank continued to be a depository of public funds, properly designated as aforesaid, and said defendant, with the knowledge of the Postmaster General and of the said Department, continued to deposit sufficient of said postal funds received by him as such deputy postmaster to pay the said current expenses of said office, and all money-order funds received by him as such deputy postmaster while the same were awaiting transmission under the instructions of Postmaster General, in said bank until its suspension as aforesaid, and that said order or instruction of the Postmaster General continued in force during all of said time.

32

And this defendant avers that at the time of said suspension of said bank there were in said bank $24,960.00 of said postal funds and $15,684.00 of said money-order funds, balances of said postal

funds and money-order funds so deposited there by said defendant as aforesaid, all of which was then and for a long time previous well known to said Postmaster General, and said funds and accounts thereof were always kept by said bank separate and distinct, and appeared on the books of said bank as "postal funds" and as "money-order funds," respectively; and this defendant avers that he
33 was authorized and permitted by the laws of the United States and by instructions of said Postmaster General to deposit said money-order funds in said bank and to use the drafts of said bank for transmitting said funds; that he received directions from time to time from the Post Office Department of the United States to transmit money-order funds at different places, and he made such transmission by means of the drafts of said bank, and that under instructions from said Department he transmitted to the deputy postmaster of the United States at New York, three times each week, all such surplus of such money-order funds as he should have on hand after meeting and filling the requisitions and orders of said Department.

And this defendant avers that the said money-order funds in said bank as aforesaid at the time of its said suspension had been received by said defendant and deposited in said bank during the day or two preceding the day of the suspension of said bank, and were awaiting transmission according to the orders of said Postmaster General and said Department, and that there was no other proper place, under the instructions of said Postmaster General, for the deposit of said funds during that time, and that the said postal funds in said bank at the time of its suspension as aforesaid were the funds necessary for these current expenses of his said office as afore-
34 said, and that there was no other place provided by the plaintiff and there was no other proper place under the instructions of the said Postmaster General to keep said postal funds.

And this defendant avers that on and before the deposit by said defendant of the said postal funds and money-order funds last named in said bank as aforesaid the said United States, through its Secretary of the Treasury, held United States bonds belonging to said bank to a large amount, to wit, to the amount of $150,000.00, as security for all public money that should be deposited in said bank; that after the said bank and its assets had gone into the possession and control of said receiver as aforesaid the said United States, by its Secretary of the Treasury, sold said bonds and realized from the sale thereof a large sum of money, to wit, the sum of $175,000.00, and applied a portion of said proceeds, to wit, $19,239.05, of said proceeds upon the amounts due from said bank on the said deposits therein by said defendant in same manner as on a debt due from said bank to the said United States; that said portion of said proceeds was allowed to said bank by said United States upon each of said accounts *pro rata*—that is to say, $11,803.98 was allowed and credited upon said postal funds and $7,435.07 upon the said money-order funds as deposited in said bank as aforesaid, so that there
35 remained due from said bank $13,156.02 of postal funds and $8,248.93 of money-order funds of said deposits, which was

then and has since continued to be the only debt due the said United States from said bank.

And this defendant avers that since said application of the proceeds of said bond as aforesaid the said receiver of said bank has realized from the other assets of said bank, and over and above all expenses and costs, a large sum of money, to wit, $100,000.00, more than sufficient to pay to the said United States the balance due from said bank on accounts aforesaid, and is now in the possession and control of said bank and its assets, and that said defendant has never received any of the funds so deposited in said bank as aforesaid.

And this defendant avers that he was required to and did account to said Postmaster General quarterly during the time he held said office as deputy postmaster as aforesaid, to wit, the 19th day of January, 1875, to wit, until the 10th day of March, 1877, for all his receipts and payments and balances as such deputy postmaster, and that after said suspension of said bank said sums so deposited in said bank as aforesaid were not accounted for in any of said quarterly accounts as being on hand or as being paid out by him,
36 but only as being in said bank, and said accounts were passed and approved by said Postmaster General, and this defendant was not required to pay over said funds and had no notice that said plaintiff claimed said funds from this defendant until after he had ceased to be such deputy postmaster and a short time before the commencement of this suit, to wit, on the 7th day of October, 1877.

And this defendant avers that it became and was necessary, under the instructions of the said Postmaster General of the United States, for this defendant, for the proper performance of his duties as such deputy postmaster and the proper fulfillment of the requirements and instructions of the Postmaster General and of said Department, to deposit a portion of the postal funds received by him as such deputy postmaster in another bank or banks in said Chicago, and that he thereupon, after the execution of said pretended bond and on, to wit, the 22nd day of June, 1874, for the purpose of properly performing his said duties and filfilling said requirements and instructions, deposited in the Home National Bank of Chicago a portion of said postal funds, to wit, $14,000.00 of said postal funds, the same being deposited and received and held by said bank as the money of the said United States and of the Post Office Department thereof.

And this defendant avers that, after the said funds were deposited in said bank as aforesaid and after he had ceased to be such
37 deputy postmaster, he was upon his own petition adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, under the bankrupt law in force in the United States; and afterward, to wit, on the 27th day of April, 1877, an assignee was appointed by said court of the estate of this defendant, and that said assignee is and was, at the time of the commencement of this suit, in possession and control of said estate, and that said Home National Bank has always refused to pay said funds to this defendant or on his check, order, draft, or demand or to said assignee.

And this defendant avers that neither he nor his assignee nor any other person except the said United States are [is] able to obtain or receive said funds from said Home National Bank, as the same are the funds of the said United States as aforesaid.

And this defendant avers that before the commencement of this suit, to wit, on the 7th day of July, 1877, he caused said United States and said Postmaster General to be notified that said funds had been deposited in said Home National Bank as aforesaid, and that the said bank still held the same as United States funds, and requested said United States and said Postmaster General to demand and receive the same and to allow and credit the same to this defendant on any claim they might have against him as said deputy postmaster as aforesaid.

38 And this defendant avers that said Home National Bank is a national banking association or bank organized and being operated under the laws of the United States relating to national banks, and that the same is and was, at the time this suit was commenced, doing a banking business under said law and fully responsible for said funds, and that said United States and the Secretary of the Treasury thereof holds and did hold, at the time of the commencement of this suit, bonds of the United States belonging to said Home National Bank to a large amount and value, to wit, to the amount and value of $100,000.00, and sufficient to cover and secure and pay the said funds so held by said bank as aforesaid and all the claims or demands of the said United States against said bank.

And this defendant avers that the said balance of money-order funds deposited in said Cook County National Bank as aforesaid, to wit, $8,248.93, and the said balance of postal funds deposited in said Cook County National Bank as aforesaid, to wit, $13,156.02, and said postal funds deposited in said Home National Bank as aforesaid, to wit, $14,000.00, are the money-order funds, and are a portion, to wit, $—, of the postal funds mentioned in said declaration, and are $35,504.95 of all the money mentioned in said declaration.

39 And this defendant avers that he hath at all times since making the said bond well and truly performed and fulfilled all and singular the other matters and things specified in said condition on his part to be performed and fulfilled according to the tenor and effect of said condition, except as to said money-order funds and postal funds last above named and, as hereinbefore set forth in regard to same, he has at all times paid to and for the said United States all moneys and balances which came into his hands or were collected or received by him from postage collected or postage stamps or stamped envelopes sold, or from any other source connected with the postal service of the said United States, and all moneys or balances which came to his hands from money orders issued by him or from any other source connected with the postal service of the said United States and relating to postal money orders, in manner prescribed by the Postmaster General of the United States, and has paid and transferred to Frank W. Palmer, deputy postmaster at said Chicago, all public money collected by him or

otherwise placed in his possession or custody as such deputy postmaster according to the orders of said Postmaster General, and has kept safely without using, until the same was ordered by said Postmaster General to be transferred or paid out, all public money collected by him or otherwise placed in his possession or custody as such deputy postmaster, and has not used or converted same or any part thereof to or for his own purposes before the same was ordered by said Postmaster General to be transferred or paid out, and has at all times accounted with the United States, in the manner directed by said Postmaster General, for all money, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and other property and papers received by him as such deputy postmaster as aforesaid or as agent or depositary for the Post Office Department of the United States for the use or benefit of said Post Office Department.

And this the said defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have its aforesaid action, &c.

And, for a further plea in this behalf, the said defendant, John McArthur, says that the plaintiff ought not to have its aforesaid action against him, because he says that at the time of the commencement of this suit there was due from him to the plaintiff upon the said bond, by the condition thereof, the sum of, to wit, $10,000.00.

And this defendant further says that the plaintiff was, before and at the time of the commencement of this suit and still is, indebted to this defendant in a much larger sum of money than the said sum due from this defendant to the plaintiff upon the said bond—that is to say, the sum of ($50,000.00) fifty thousand dollars—for money (being postal funds received by this defendant as deputy postmaster of the United States at Chicago, Illinois) paid to the Cook County National Bank of Chicago for the plaintiff; also for money (being postal funds received by this defendant as deputy postmaster of the United States at said Chicago, Illinois) paid to the Home National Bank of Chicago for plaintiff; also for labor and services done and performed and materials provided by this defendant for the plaintiff, at its request, in the erection and completion of the sub-treasury building at San Francisco, California.

Also in the like sum for labor and services done and performed and materials provided by this defendant for the plaintiff, at its request, in the erection and completion of the United States court-house and post office at Lincoln, Nebraska.

Also in the like sum for work and services before that time done and bestowed and materials for the same work furnished by him for the said United States, at its request, and in the like sum of money before that time paid out and expended by this defendant for the use of the said United States, at its request, and in the like sum of money before that time received by the said United States for the use of this defendant, and in the like sum for interest and divers sums of money before that time forborne by this defendant to the said United States, at its request, for divers spaces of time before then elapsed, and in the like sum of money found to be due from the said United States to him (this defendant)

on an account then and there stated between them; which said sums of money so due from said plaintiff to this defendant as aforesaid, or so much thereof as shall be necessary in this behalf, this defendant is ready to verify and willing and offers to set-off and allow against the said sums of money so remaining due by the said condition of the said bond, according to the form of the statute, &c.

And this he (the said defendant) is ready to verify. Wherefore he prays judgment if the plaintiff ought to have its aforesaid action, &c.

Copy of Account Claimed in 16th or Last Plea.

The United States to John McArthur, Dr.

To labor and services furnishing iron-work for U. S. sub-treasury building at San Francisco, California, to wit:

To iron-work, as per original contract	$14,581 78
" spiral stairs, as per contract	490 00
" extra stairs, as per contract	950 00
" 1–12 l't beams, 1060 # } " 2–10 h'y beams, 1281 # } = 2341 #, 6½c.	158 02
" 288 ft. extra iron, 12c.	60 48
" 1 column for attic story, 425 #, 5½c.	23 26
" 1 shade base for above, 17 #, 10c.	1 70
" 1 top & 1 bottom plate for above, 78 #, 5½c.	4 29
" 2 rolled-iron beams, 947 #, 6½c.	61 55
" 2 fish-plates for connections, W. I., 22 #, 10c.	2 20
To 8 bolts & nuts for above, 4½c.	1 00
43 " 2 cast-iron plates under ends of beams in wall, 50 #, 4½c.	2 25
To 1 scuttle and flume fitted in place in roof	75 00
" extra labor cutting holes in walls for beams fitting corrugated iron around hatch	15 00
" 131 days' extra time of assistant superintendent at San Francisco to put work in place	1,310 00
" paid for board of ass't sup't for same time	375 00
" extra time of men in same	100 00
" interest in delayed payments	
	$18,211 53
" damages on account of delay of 5 months by United States	

CR.

1876.		
May 1.	By estimate from Samuel McCollough, sup't	2,050 16
June 2.	" " " " "	2,742 04
July 1.	" " " " "	2,929 24
Aug. 3.	" " " " "	307 58
Sep. 2.	" " " " "	2,525 61
Nov. 17.	" " " " "	1,584 36
Dec. 23.	" " " " "	351 00

1877.			
Feb. 5.	By estimate from Samuel McCollough, sup't --		1,623 78
	" allowance for spiral stairs, as per proposal--		100 00
			14,213 77
44	By balance due on San Francisco work (damages and interest excluded)----------		3,997 76
	By labor and services furnishing iron-work for U. S. court-house & post office at Lincoln, Nebraska, to wit:		
	" contract price for furnishing the iron-work of the U. S. court-house and post office at Lincoln, Nebraska, as per contract made Dec. 10, 1875 ----------	3,581 18	
	Extra work not in schedule:		
	" 225 $\frac{5}{8}$ x 4$\frac{1}{4}$ bolts, at 8$\frac{1}{2}$c.----------	19 12	
	" drilling holes for same, 99 hours, at 15c.-	14 85	
	" labor, machinists, 20 hours, 2 men, at 25c. per hour----------	10 00	
	" helper, 20 hours, at 15c.----------	3 00	
		$3,628 15	
	" paid fare to Lincoln and return of man to put work in place----------	40 00	
	" paid meals on route----------	5 00	
	" time going and returning, 3 days -------	9 00	
	" interest on delayed payments----------		
	" damages on account of delay of 15 months by United States----------		
		3,682 15	

CREDIT.

1876.			
July 17.	By cash on ac.----------	2,587 34	
	To balance due on Lincoln, Nebraska, work (damages & interest excluded) ----------	---------	1,094 81
	To money paid or deposited in the Cook County National Bank and accepted by the United States ---	---------	21,404 95
	To money paid or deposited in the Home National Bank of Chicago for the United States ----------	14,000 00	14,000 00

JOHN BORDEN,
Def't-' Att'y.

Endorsed: Filed Jan. 17, 1878. Wm. H. Bradley, clerk.

45 On the same day, to wit, on the seventeenth day of January, 1878, came Charles Hopkinson, Carlile Mason, John

Alston, James Steele, and Thomas S. Dobbins, by their attorneys, and filed in said clerk's office their pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

46 In the Circuit Court of the United States for the Northern District of Illinois.

JOHN MCARTHUR *et al.*, Sureties upon His Official Bond, *ats.* THE UNITED STATES.

1. And the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, by John W. Ela, their attorney, come and defend the wrong injury when, &c., and say that the supposed writing obligatory in the said declaration mentioned is not their deed, and of this they put themselves upon the country &c.

47 2. And, for a further plea in this behalf, the said defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, say *actio non*, because they say that said defendant, John McArthur, did from time to time and at all times after the making of the said writing obligatory and the said condition thereof well and truly keep and perform all and singular the matters and things in the said condition specified on his part to be kept and performed according to the tenor and effect of the said condition, and did well and truly execute the duties of said office of deputy postmaster according to law and the instructions of the said Postmaster General, and did faithfully, once in three months and as often as thereto required, render accounts of his receipts and expenditures as such deputy postmaster to the said Post Office Department in the manner and form prescribed by the said Postmaster General in his several instructions to postmasters, and did pay the balance of all moneys which came to his hands from postage collected, postage stamps or stamped envelopes sold, or money orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster General of the United States for the time being, and did keep safely, without loaning, using, depositing in other banks, or exchanging for other funds than as allowed by law, all the public money collected by

48 him or otherwise at any time placed in his possession or custody till the same was ordered by said Postmaster General to be transferred or paid out, and, when such orders for transfer or payment were received, did faithfully and promptly make the same as directed, and did also faithfully do and perform as agent and depositary for the said Post Office Department all such acts and things as were required of him by said Postmaster General, and did faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, mail bags, and other property and papers which he (said McArthur), as deputy postmaster or agent or depositary as

aforesaid, received for the use or benefit of the said Post Office Department according to the tenor and effect of said condition, and this the defendants are ready to verify. Wherefore they pray judgement if the plaintiff ought to have its aforesaid action, &c.

3. Now come the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, by John W. Ela, their attorney, and, for a further plea in this behalf, say *actio non*, because they say that heretofore, to wit, on the 20th day
49 of December, 1872, the said defendant, John McArthur, was duly appointed deputy postmaster at Chicago, and afterwards, to wit, on said 20th day of December, 1872, said appointment was confirmed by the Senate of the United States; that as such deputy postmaster said McArthur was required to enter into a bond for the faithful discharge of his duties, and these defendants afterwards, to wit, on the 10th day of January, 1873, executed the pretended bond declared on hereon as sureties only; that said pretended bond was conditioned as in said declaration alleged, and that when these defendants executed said pretended bond they became sureties for the faithful performance by the said deputy postmaster of the duties required by law; and these defendants aver that it was prescribed and required by the laws of the United States at the time of the execution and delivery of said pretended bond, and has so ever since continued, that all postmasters at cities where there is an assistant treasurer of the United States shall deposit all postal revenues and all money accruing at their office with such assistant treasurer as often as once a week at least, and as much oftener as the Posmaster General may direct, and that soon after the execution and delivery of said bond, to wit, on the 3rd day of March, 1873, an assistant treasurer of the United States at said Chicago was duly ap-
50 pointed by the President of the United States, and said appointment was duly confirmed by the Senate of the United States in the manner prescribed by law, and said assistant treasurer then and there established his office in said Chicago, and such assistant treasurer and his successor in office have continued to act as such assistant treasurer at said Chicago ever since.

And these defendants aver that thereupon, upon the appointment and confirmation of said assistant treasurer as aforesaid, it became the duty of said McArthur, and continued by law to be his duty from that time until he ceased to be said deputy postmaster, to deposit all postal funds received by him as such deputy postmaster as often as once a week, and as much oftener as the said Postmaster General might direct, with the said assistant treasurer at said Chicago.

And these defendants aver that soon after the appointment and confirmation of said assistant treasurer as aforesaid, to wit, on the 4th day of June, 1873, the Postmaster General of the United States issued and caused to be received by said McArthur a written order or instruction directing said McArthur, as such deputy postmaster as aforesaid, in substance and among other things, that, as an assistant treasurer of the United States had been appointed for said Chicago, he (said McArthur) should thereafter deposit with said

51 assistant treasurer daily all surplus postal funds received by him as such deputy postmaster, reserving sufficient to pay the current expenses of his (said McArthur's) office, and that thereupon said McArthur, acting under and in accordance with said order of said Postmaster General (which continued in force from the time it was issued as aforesaid until said McArthur ceased to be said deputy postmaster), commenced to deposit daily all postal funds received by him as said deputy postmaster with said assistant treasurer, except such as were necessary for the current expenses of his office, and to reserve such of said funds as were necessary for the current expenses of said office in his own hands or under his own control, and so continued to do after that date while he held said office of deputy postmaster as aforesaid; that the current expenses of said office were a very large sum of money, to wit, about the sum of $45,000.00 per month, and that during all that time said McArthur, with the full knowledge of said Postmaster General, deposited a portion of the funds so reserved by him under said order as aforesaid in different national banks in said Chicago, to wit, in the Cook County National Bank of Chicago, the Third National Bank of Chicago, and the Home National Bank of Chicago; also during said time employed some of said funds in his private business; all
52 of which actions and doings of said Postmaster General and said McArthur were without the knowledge or consent of said defendants.

And these defendants aver that by means of said McArthur being allowed and directed to reserve said funds and so keep the same under his own control, instead of depositing the same with said assistant treasurer, as required by law and as these defendants believed and had reason and right to believe he was doing, and by reason of the said actions and doings of said Postmaster General in changing the duties and powers of said McArthur as such deputy postmaster as aforesaid and the actions and doings of said McArthur in pursuance of the said order and instructions of said Postmaster General, the said sums of money in said declaration mentioned became and were wholly lost.

And these defendants aver that the said United States, by its said actions of its said Postmaster General, changed the duties and power of said deputy postmaster after the execution of said pretended bond without the knowledge or consent of these defendants, and thereby materially increased the risk of said sureties, and they were then and there thereby discharged; all of which they are ready to verify. Wherefore they pray judgement.

53 4. Now come the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, by John W. Ela, their attorney, and, for a further plea in this behalf, say *actio non*, because they say that heretofore, to wit, on the 20th day of December, 1872, the said defendant, John McArthur, was duly appointed deputy postmaster at Chicago, and afterwards, to wit, on said 20th day of December, 1872, said appointment was confirmed by the Senate of the United States; that as such deputy postmaster said McArthur was required to enter into a bond for the

faithful discharge of his duties, and these defendants afterwards, to wit, on the 10th day of January, 1873, executed the pretended bond declared on herein as sureties only, and that said pretended bond was conditioned as in said declaration alleged.

And these defendants aver that said McArthur, soon after he was appointed such deputy postmaster as aforesaid, to wit, within six months thereafter, contrary to law, commenced to and did take under his own control and deposit in banks and use in his private business a large amount of the money belonging to the said United States and which came into his hands as such deputy postmaster, and that he continued so to do from time to time thereafter
54 until he ceased to be such deputy postmaster, to wit, on the 10th day of March, 1877; that he returned said money, or money to replace the same, to the said United States at different times for short times, and then soon thereafter again took and kept the same under his control, and deposited as aforesaid and used other large amounts of said funds as aforesaid, so that during the time that said McArthur held said office of deputy postmaster as aforesaid, to wit, four years, said McArthur had in his own hands and in banks, subject to his order and under his control and used in his private business, a large amount of said funds, to wit, $100,000.00 thereof, during a large part of each of said years, to wit, six months of each of said years.

And these defendants aver that among the funds so taken and deposited and used by said McArthur as aforesaid are those mentioned and claimed in said declaration, which said last-named funds were so taken and deposited in banks and used as aforesaid by said McArthur during the last two of said years, to wit, during each month of the year 1875 and 1876, and that said last-named funds were lost by said McArthur by reason of his so taking the same under his control and depositing and using the same as aforesaid and being permitted and allowed by the United States so to do.

55 And these defendants aver that said McArthur was by law required to account to the Post Office Department of the United States frequently during all of said years, and especially once every three months during said years, for all funds received by him as such deputy postmaster as aforesaid, and to pay the same to said United States and deposit same in the Treasury thereof or other place properly designated for that purpose, and that said McArthur did during said time, as and when required as aforesaid, render accounts to said Postmaster General which purported to be true accounts of all of said funds so received by him as such deputy postmaster, which accounts were allowed, approved of, and passed by said Postmaster General and said Post Office Department, and said McArthur paid over or deposited to or for said United States, when and as required by said Postmaster General and by the plaintiff, such funds or balances as appeared by said accounts to be on hand.

And these defendants aver that there was at said Chicago during all of said time, to wit, said four years, an officer of the United States, duly appointed according to the laws thereof and called special

agent of the Post Office Department, whose duty it was to examine and supervise all the action and doings of said McArthur as
56 such deputy postmaster and all his books and accounts, receipts, and payments as such deputy postmaster, and to see that the same were proper and correct, and that all the books and accounts of said McArthur as such deputy postmaster were at all times open to the inspection of said special agent.

And these defendants aver that said Postmaster General and Post Office Department, when they so allowed, passed, and approved of the said accounts, might without their wilful and gross neglect or default have discovered any sums received by said McArthur as such deputy postmaster not included and which ought to have been included therein, and any false or fraudulent entry, calculation, balance, or other error or deceit in said accounts; yet the said Postmaster General and said Department neglected so to do, and neglected to require said McArthur to pay over any other sums than the amounts so accounted for and paid as aforesaid.

And the defendants aver that said special agent of the Post Office Department might, without his wilful and gross neglect and fraud, have discovered and known that said McArthur was taking and depositing said funds in banks and using the same in his private business as aforesaid, and have discovered any sums received by said McArthur as such deputy postmaster not included and which ought to have been included in said accounts so rendered to
57 said Postmaster General and said Department as aforesaid or in said books and accounts of said McArthur as said deputy postmaster, and any false or fraudulent entry, calculation, balance, or other error or deceit in said accounts or in said books and accounts; yet said special agent of the Post Office Department neglected so to do.

And these defendants aver that said Postmaster General and said special agent and said plaintiff neglected to give due notice to these defendants of any refusal or default of said McArthur to pay over or account for any sum for three years after he had failed to pay over or account for the first of said money mentioned in said declaration, and had commenced to make such default in that behalf and for one year after said McArthur had failed to pay over or account for the last of said money mentioned in said declaration, and had ceased to make said default in that behalf, and that the said money was being taken and used by said McArthur as aforesaid in several sums at different times during said years 1875 and 1876; and these defendants aver that during said years 1875 and 1876 and for several years before that time said McArthur was solvent and was able to pay the said money in said declaration mentioned, and that said money could have been collected of him if proceedings for its collection had been instituted and prosecuted with due diligence, but that when these defendants were notified that the plain-
58 tiff claimed that said McArthur had failed to pay over or account for any money as such deputy postmaster, or had made any default in the performance of the condition of said bond, said

McArthur had then recently become insolvent and had been adjudged a bankrupt and has so since continued.

And these defendants say that, by reason of the premises and of the gross and wilful laches, neglect, default, and fraud of the plaintiff and of its officers in that behalf, and inasmuch as these defendants, without their default, were altogether ignorant of the premises, these defendants became wholly discharged from all liability to the plaintiff on said bond by reason of said McArthur's refusal or neglect to pay (or transfer or account for) said sums by him received as aforesaid, or by his using or converting said sums as in said declaration alleged.

And this these defendants are ready to verify. Wherefore they pray judgement, &c.

5. Now come the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, by John W. Ela, their attorney, and, for a further plea in this behalf, say *actio non*, because they say that heretofore, to wit, on the 20th day of December, 1872, the said defendant, John McArthur, was duly appointed deputy postmaster at Chicago, and afterwards, to wit, on said 20th day of December, 1872, said appointment was confirmed by
59 the Senate of the United States; that as such deputy postmaster said McArthur was required to enter into a bond for the faithful discharge of his duties; and these defendants afterwards, to wit, on the 10th day of January, 1873, executed the pretended bond declared on herein as sureties only; that said pretended bond was conditioned as in said declaration alleged.

And these defendants aver that said McArthur, as such deputy postmaster, during a long time, to wit, from the time of his appointment as such deputy postmaster as aforesaid until he ceased to be such deputy postmaster, to wit, on the 10th day of March, 1877, to wit, four years, with the knowledge and permission of the plaintiff and of the Postmaster General of the United States, but contrary to law, did keep in his own possession and under his control, and deposit in banks not authorized or designated for that purpose according to law, and use in his private business large sums of money, amounting in all to a large sum of money, to wit, one hundred thousand dollars, and that by reason of said McArthur so keeping and depositing and using said money a large portion thereof, to wit, the sums mentioned in said declaration, became and were lost.

And these defendants aver that said McArthur was by law required to account to the Postmaster General and the Post Office Department of the United States frequently during all of said years, and especially once every three months during said years, for all funds received by him as such deputy postmaster as aforesaid,
60 and to pay the same to said United States and deposit same in the Treasury thereof or other place properly designated for that purpose, and that said McArthur did, during said time, as and when required as aforesaid, render accounts to said Postmaster General and said Department, which purported to be true accounts, of all of said funds so received by him as such deputy postmaster, which accounts were allowed, approved of, and passed by said Post-

master General and said Department, and said McArthur paid over or deposited to or for the said United States, when and as required by said Postmaster General or said Department and by the plaintiff, such funds or balance as appeared by said accounts to be on hand.

And these defendants aver that there was at said Chicago during all of said time, to wit, said four years, an officer of the United States, duly appointed according to the laws thereof and called a special agent of the Post Office Department, whose duty it was to examine and supervise all the actions and doings of said McArthur as such deputy postmaster and all his books and accounts, receipts, and payments as such deputy postmaster, and to see that the same were proper and correct, and that all the books and accounts of said McArthur as such deputy postmaster were at all times open to the inspection of said special agent.

And these defendants aver that said Department and Postmaster General, when they so allowed, passed, and approved of the said
61 accounts, might, without their wilful and gross neglect or default, have discovered any sums received by the said McArthur as such deputy postmaster not included and which ought to have been included therein, and any false or fraudulent entry, calculation, balance, or other error or deceit in said accounts.

Yet the said Postmaster General and Department neglected so to do, and neglected to require said McArthur to pay any other sums than the amounts so accounted for and paid as aforesaid.

And the defendants aver that said special agent of the Post Office Department might, without his wilful and gross neglect and fraud, have discovered and known that said McArthur was taking and depositing said funds in banks and using the same in his private business as aforesaid, and have discovered any sums received by said McArthur as such deputy postmaster not included and which ought to have been included in said accounts as rendered to said Postmaster General and Department as aforesaid, or in said books and accounts of said McArthur as said deputy postmaster, and any false or fraudulent entry, calculation, balance, or other error or deceit in said accounts or in said books and accounts.

Yet said special agent of the Post Office Department neglected so to do.

And these defendants aver that said Postmaster General
62 and said special agent and said plaintiff neglected to give due notice to these defendants of any refusal or default of said McArthur to pay over or account for any sum, or of any failure or default of said McArthur in performance of the condition of said bond for four years after said McArthur had commenced to and did take, deposit, and use said moneys contrary to law, as hereinbefore set forth, and two years after said McArthur had failed to pay over or account for and did so take, use, and deposit the moneys in said declaration mentioned, to wit, on the 1st day of July, 1877.

And these defendants aver that at the time when said money mentioned in said declaration was taken, deposited, and used as aforesaid, and when said McArthur failed to account for and pay over same as aforesaid, and for several years prior thereto, said McArthur was

solvent and was able to pay the said money in said declaration mentioned, and said money could have been collected of him if proceedings for the collection had been instituted and prosecuted with due diligence; but that, when these defendants were notified that the plaintiff claimed that said McArthur had failed to pay over or account for any money as such deputy postmaster, or had made any default in the performance of the condition of said bond, said McArthur had then recently become insolvent and had been adjudicated a bankrupt, and has so since continued.

63 And these defendants say that, by reason of the premises and of the gross and wilful laches, neglect, default, and fraud of the plaintiff and of its officers in that behalf, and inasmuch as these defendants, without their default, were altogether ignorant of the premises, these defendants became wholly discharged from all liability to the plaintiff on said bond by reason of said McArthur's refusal or neglect to pay (or transfer or account for) said sums by him received as aforesaid, or by his using or converting said sums as in said declaration alleged.

And this these defendants are ready to verify.

Wherefore they pray judgement, &c.

64 6. Now come the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, by John W. Ela, their attorney, and, for a further plea in this behalf, say *actio non*, because they say that heretofore, to wit, on the 20th day of December, 1872, the said defendant, John McArthur, was duly appointed deputy postmaster at Chicago, and afterwards, to wit, on the said 20th day of December, 1872, said appointment was confirmed by the Senate of the United States; that as such deputy postmaster said McArthur was required to enter into a bond for the faithful discharge of his duties, and these defendants afterwards, to wit, on the 10th day of January, 1873, executed the pretended bond declared on herein as sureties only; that said pretended bond was conditional as in said declaration alleged, and that when these defendants executed said pretended bond they became sureties for the faithful performance by the said deputy postmaster of the duties required by law and the instructions of the Postmaster General of the United States; and these defendants aver that after the execution and delivery of said pretended bond, to wit, on the 4th day of June, 1873, and at or about the time of the appointment and establishing at said Chicago of an assistant treasurer of the United States, the Postmaster General for the time being of the United

65 States issued and sent to said deputy postmaster at said Chicago a written order or instruction directing said McArthur, as such deputy postmaster as aforesaid, that, as an assistant treasurer of the United States had been appointed for Chicago, he should thereafter deposit with the said assistant treasurer daily all surplus postal funds received by him as such deputy postmaster, reserving sufficient to pay the current expenses of his (McArthur's) office; that prior to said appointment of an assistant treasurer of the United States at said Chicago said McArthur, as such deputy postmaster, had deposited the moneys which had come into his hands as such

deputy postmaster, both postal and money-order funds, in the Cook County National Bank at said Chicago, which bank was a national banking association designated by the Secretary of the Treasury of the United States, under the laws of the United States, for a depository of public funds, and that when said McArthur received said order or instruction from said Postmaster General as aforesaid he commenced and thereafter, and during all the time he held said office, continued to deposit the postal funds received by him as such deputy postmaster with said assistant treasurer, reserving such as were required for the current expenses of his office, as directed by said order, and continued to deposit such of said postal funds as were necessary for the current expenses of his office, together
66 with money-order funds, in said Cook County National Bank until said bank suspended, as hereinafter set forth; all of which was well known to said plaintiff and to said Postmaster General and Post Office Department.

And these defendants aver that on or about the 19th day of January, 1875, said Cook County National Bank suspended payment, and a receiver was appointed by the Comptroller of the Currency of the United States and took possession of the assets of said bank under the laws of the United States; that said bank continued to be a depository of public funds, properly designated as aforesaid, and said McArthur, with the knowledge of said Postmaster General and of said Department, continued to deposit sufficient of said postal funds received by him as such deputy postmaster to pay the said current expenses of his said office and all money-order funds received by him as such deputy postmaster (while the same were awaiting transmission under the instruction of said Postmaster General) in said bank until its suspension as aforesaid, and that said order or instruction of the said Postmaster General continued in force during all of said time.

And these defendants aver that at the time of said suspension of said bank there were in said bank $24,960.00 of said postal funds and $15,684.00 of said money-order funds, balance of said
67 postal funds and money-order funds so deposited there by said McArthur as aforesaid, all of which was then and for a long time previous well known to said Postmaster General, and said funds and accounts thereof were always kept by said bank separate and distinct, and appeared on the books of said bank as "postal funds" and as "money-order funds," respectively.

And these defendants aver that said McArthur was authorized and permitted by the laws of the United States and by the instructions of the said Postmaster General to deposit said money-order funds in said bank and to use the drafts of said bank for transmitting said funds; that he received directions from time to time from the Post Office Department of the United States to transmit money-order funds to different places, and that he made such transmission by means of the drafts of said bank, and that under instructions from said Department he transmitted to the deputy postmaster of the United States at New York three times each week all such surplus

of such money-order funds as he should have on hand after meeting or filling the requisitions and orders of said Department.

And these defendants aver that the said money-order funds in said bank aforesaid at the time of its said suspension had been received by said McArthur and deposited in said bank during the day or two preceding the day of the suspension of said bank
68 and were awaiting transmission according to the orders of said Postmaster General and said Department, and that there was no other proper place under the instructions of said Postmaster General for the deposit of said funds during that time, and that the said postal funds in said bank at the time of its suspension as aforesaid were the funds necessary for the then current expenses of his said office as aforesaid, and that there was no other place provided by the plaintiff and there was no other proper place under the instructions of the said Postmaster General to keep said postal funds.

And these defendants aver that on and before the deposit by said McArthur of the said postal funds and money-order funds last named in said bank as aforesaid the said United States, through its Secretary of the Treasury, held United States bonds belonging to said bank to a large amount, to wit, to the amount of $150,000.00, as security for all public money that should be deposited in said bank; that after the said bank and its assets had gone into the possession and control of the said receiver as aforesaid the said United States, by its said Secretary of the Treasury, sold said bonds and realized from the sale thereof a large sum of money, to wit, the sum of $175,000.00, and applied a portion of said proceeds, to wit, $19,239.05 of said proceeds, upon the amounts due from said
69 bank on the said deposits therein by said McArthur in same manner as on a debt due from said bank to the said United States; that said portion of said proceeds was allowed to said bank by said United States upon each of said accounts *pro rata*—that is to say, $11,803.98 was allowed and credited upon the said postal funds and $7,435.07 upon the said money-order funds so deposited in said bank as aforesaid, so that there then remained due from said bank $13,156.02 of postal funds and $8,248.93 of money-order funds of said deposits, which was then and has since continued to be the only debt due the United States from said bank.

And these defendants aver that since said application of the proceeds of said bonds as aforesaid the said receiver of said bank has realized from the other assets of said bank, and over and above all expenses and costs, a large sum of money, to wit, $100,000.00, and more than sufficient to pay to the said United States the balance due from said banks on said accounts aforesaid, and is now in the possession and control of said bank and its assets, and that said McArthur has never received any of the funds so deposited in said bank as aforesaid.

And these defendants aver that said McArthur was required to and did account to said Postmaster General quarterly during the time he held said office of deputy postmaster as aforesaid, to
70 wit, until the 10th day of March, 1877, for all receipts and payments and balances on hand by and as such deputy post-

master, and that after said suspension of said bank, to wit, the 19th day of January, 1875, said sums so deposited in said bank as aforesaid were not accounted for in any of said quarterly accounts as being on hand or as being paid out by said McArthur, but only as being in said bank, and said accounts were passed and approved by said Postmaster General, and said McArthur was not requested to pay over said funds, and neither said McArthur nor these defendants had any notice that said plaintiff claimed said funds from said McArthur or from these defendants until after said McArthur had ceased to be such deputy postmaster and a short time before the commencement of this suit, to wit, on the 7th day of October, 1877.

And these defendants aver that it became and was necessary, under the instructions of the said Postmaster General of the United States, for the said McArthur, for the proper performance of his duties as such deputy postmaster and the proper fulfillment of the requirements and instructions of the Postmaster General and of said Department, to deposit a portion of the postal funds received by him as such deputy postmaster in another bank or banks in said Chicago, and that he thereupon, after the execution of said pretended bond and on, to wit, the 22d day of June, 1874, for the purpose of
71 properly performing his said duties and fulfilling said requirements and instructions, deposited in the Home National Bank of Chicago a portion of said postal funds, to wit, $14,100.00 of said postal funds, the same being deposited and received and held by said bank as the money of the said United States and of the Post Office Department thereof.

And these defendants aver that, after the said funds were deposited in said bank as aforesaid and after he had ceased to be said deputy postmaster, said McArthur was, upon his own petition, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, under the bankrupt law in force in the United States; and afterwards, to wit, on the 27th day of April, 1877, an assignee was appointed by said court of the estate of said bankrupt, and that said assignee is and was at the time of the commencement of this suit in possession and control of said estate, and that said Home National Bank has always refused to pay said funds to said McArthur or on his check, order, draft, or demand, or its said assignee.

And these defendants aver that neither the said McArthur, nor his assignee, nor any other person except the said United States are able to obtain or receive said funds from said Home National Bank, as the same are the funds of the said United States as aforesaid.

And these defendants aver that before the commencement of this suit, to wit, on the 7th day of July, 1877, they caused said
72 United States and said Postmaster General to be notified that said funds had been deposited in said Home National Bank as aforesaid, and that the said bank still held the same as United States funds, and requested said United States and said Postmaster General to demand and receive the same, and to allow and credit the same to said McArthur on any claim they might have against him as said deputy postmaster as aforesaid.

And these defendants aver that said Home National Bank is a national banking association or bank organized and being operated under the laws of the United States relating to national banks, and that the same is and was at the time this suit was commenced doing a banking business under said law and fully responsible for said funds, and that said United States and the Secretary of the Treasury thereof hold and did hold at the time of the commencement of this suit bonds of the United States belonging to said Home National Bank to a large amount and value, to wit, to the amount and value of $100,000.00, and sufficient to cover and secure and pay the said funds so held by said bank as aforesaid and all other claims or demands of the said United States against said bank.

And these defendants aver that the said balance of money-order funds deposited in said Cook County National Bank as aforesaid, to wit, $8,248.93, and the said balance of postal funds deposited
73 in said Cook County National Bank as aforesaid, to wit, $13,156.02, and said postal funds deposited in said Home National Bank as aforesaid, to wit, $14,100.00, are the money-order funds and are a portion, to wit, $27,256.02, of the postal funds mentioned in said declaration, and are $35,504.95 of all the money mentioned in said declaration.

And these defendants aver that said McArthur hath, at all times since making the said bond, well and truly performed and fulfilled all and singular the other matters and things specified in said condition on his part to be performed and fulfilled, according to the tenor and effect of said condition, except as hereinbefore set forth, and that, except as to said money-order funds and postal funds last above named and as hereinbefore set forth in regard to same, he has at all times paid to and for the said United States all moneys and balances which came into his hands or was collected or received by him from postage collected or postage stamps or stamped envelopes sold or from any other source connected with the postal service of the said United States, and all moneys or balances which came to his hands from money orders issued by him or from any other source connected with the postal service of the said United States and relating to postal money orders, in manner prescribed by the Postmaster General of the United States, and has paid and transferred to Frank W. Palmer, deputy postmaster at said Chicago, all public money collected by said McArthur or otherwise
74 placed in his possession or custody as such deputy postmaster, according to the orders of said Postmaster General, and has kept safely without using, until the same was ordered by said Postmaster General to be transferred or paid out, all public money collected by him or otherwise placed in his possession or custody as such deputy postmaster, and has not used or converted same or any part thereof to or for his own purposes before the same was ordered by said Postmaster General to be transferred or paid out, and has at all times accounted with the said United States, in the manner directed by said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, and other property and papers received by

said McArthur as such deputy postmaster, as aforesaid, or as agent or depositary for the Post Office Department of the United States for the use or benefit of said Post Office Department.

And this these defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to have its aforesaid action, &c.

75 7. And, for a further plea in this behalf, *of* the said defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steele, and Thomas S. Dobbins, say that the plaintiff ought not to have its said action against them, because they say that the plaintiff was, before and at the time of the commencement of this suit and still is, indebted to said defendant McArthur in a much larger sum of money than the damages sustained by the plaintiff by reason of the non-performance of the condition of said bond in said declaration mentioned—that is to say, in the sum of ($50,000.00) fifty thousand dollars—for money (being postal funds received by said McArthur as deputy postmaster of the United States at Chicago, Illinois) paid to the Cook County National Bank of Chicago for the plaintiff and accepted by plaintiff, and in a like sum for money (being postal funds received by said McArthur as such deputy postmaster of the United States at Chicago, Illinois) paid to the Home National Bank of Chicago, Illinois, for plaintiff; also in a like sum for labor and service done and performed and materials provided by said McArthur for the plaintiff, at its request, in the erection and completion of the sub-treasury building at San Francisco, California.

Also in a like sum for labor and service done and performed and materials provided by said McArthur for the plaintiff, at
76 its request, in the erection and completion of the United States court-house and post office at Lincoln, Nebraska.

Also in the like sum for work and services before that time done and bestowed and materials for the same work furnished by said McArthur for the said United States, at its request, and in the like sum for money before that time paid and expended by the said McArthur for the use of the said United States, at its request, and in the like sum for money before that time had and received by the said United States for the use of the said McArthur, and in the like sum for interest on divers sums of money before that time forbourne by said McArthur to the said United States, at its request, for divers spaces of time before then elapsed, and in the like sum of money found to be due from the said United States to said McArthur on an account then and there stated between them; which sums of money so due from said plaintiff to the said McArthur as aforesaid, or so much thereof as shall be necessary in this behalf, the defendants are ready and willing and offer to set-off and allow against any and all damages sustained by the plaintiff by reason of the non-performance of the condition of said bond, as alleged in said declaration.

And these defendants aver that the plaintiff, before the commencement of this suit, to wit, on the 7th day of July, 1877, notified
77 said McArthur and these defendants that it would apply and credit to said McArthur said sums of money so due said

McArthur from the plaintiff as aforesaid upon the damages so sustained by plaintiff by reason of the non-performance of the condition of said bond, and it has ever since with-eld the same and claims to so apply and credit the same, or so much thereof as shall appear to be due said McArthur.

And this the defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to have its aforesaid action, &c.

78 (*Copy of Account Claimed in Set-off.*)

The United States to John McArthur, Dr.

To labor and services furnishing iron-work for U. S. sub-treasury building at San Francisco, to wit:

To iron-work, as per original contract	14,581 78
" spiral stairs, as per contract	490 00
" extra stairs, as per contract	950 00
" 1–12 l't beams, 1060 # } = 2341 #, 1½ / " 2–10 h'y beams, 1281 # }	158 02
" 288 ft. extra corrigated iron, 21c.	60 48
" 1 column for attic story, 425 lb., 5½	23 26
" 1 shade base for above, 17 lb., 10c.	1 70
" 1 top & 1 bottom plate for above, 78 lb., 5½c.	4 09
" 2 rolled-iron beams, 947 lb., 6½c.	61 55
" 2 fish-plates for connections, W. I., 22 lb., 10c.	2 20
" 8 bolts and nuts for above, 12½c.	1 00
" 2 cast-iron plates under ends of beams in walls, 50 lb., 4½c.	2 25
" 1 scuttle and frame fitted in place in roof	75 00
" extra labor cutting holes in walls for beams, fitting corrigated iron around hatch	15 00
" 131 days' extra time of assistant superintendent at San Francisco to put work in place	1,310 00
" paid for board of ass't sup't for same time	375 00
" extra time of men in same	100 00
	$18,211 53

79

Amounts forward	18,211 53
To interest on delayed payments	
To damages on account of delay of 5 months by United States	

CR.

1876.

May	1.	By estimate from Samuel McCullough, sup't	2,050 16
June	2.	" " " " "	2,742 04
July	1.	" " " " "	2,929 24
Aug.	3.	" " " " "	307 58
Sept.	2.	" " " " "	2,525 61
Nov.	17.	" " " " "	1,584 36
Dec.	23.	" " " " "	351 00

1877.			
Feb. 5.	By estimate from Samuel McCullough, sup't		1,623 78
	" allowance for spiral stairs, as per proposal		100 00
			14,213 77
To balance due on San Francisco work (damages & interest excluded)			3,997 76
To labor and services furnishing iron-work for U. S. court-house and post office at Lincoln, Nebraska, to wit:			
" contract price for furnishing the iron-work of the U. S. court-house and post office at Lincoln, Nebraska, as per contract made Dec. 10, 1875		3,581 18	
Extra work not in schedule:			
" 225 $\frac{5}{8}$ x 4$\frac{1}{4}$ bolts, at 8$\frac{1}{2}$c.		19 12	
" drilling holes for same, 99 hours, at 15c.		14 85	
" labor, machinests, 20 hours, 2 men, at 25c. per hour		10 00	
		3,625 15	
80 To am'ts bro't forward		3,625 15	
To helper, 20 hours, at 15c.		3 00	
To paid fare to Lincoln and return of man to put work in place		40 00	
" paid meals on route		5 00	
" time going and returning, 3 days		9 00	
" interest on delayed payments			
" damages on account of delay of 15 months by United States			
		3,682 15	
	Cr.		
1876.			
July 17.	By cash on ac	2,587 34	
To balance due on Lincoln, Nebraska, work (damages and interest excluded)			1,094 81
To money paid or deposited in the Cook County National Bank and accepted by the United States			21,404 95
To money paid or deposited in the Home National Bank of Chicago for the United States			14,100 00
To money paid, laid out, & expended			50,000 00
" " had and received			50,000 00
" labor, services, and material			50,000 00
" interest			50,000 00
" money due on account stated			50,000 00

JOHN W. ELA, *Att'y.*

81 (*Copy of Written Instrument Claimed under in Set-off.*)

Contract between the United States of America and John McArthur.

This contract, made and entered into by and between Wm. A. Potter, supervising architect United States Treasury Department, for and in behalf of the United States of America, of the first part, and John ——, of the city of Chicago and the State of Illinois, to whom was awarded the contract for the supply of certain wrought and cast iron work for the United States sub-treasury at San Francisco, California, on his bid for the same, received under advertisement dated November 8, A. D. 1875, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish, deliver, fit, and put in place all the wrought and cast iron work required by — for the United States sub-treasury at San Francisco, California, comprising the rolled-iron beams of first floor, the cast-iron columns, pilasters, and window breasts of the first story, and the wrought-iron grating over areas at front of building, the rolled-iron beams and cast-iron skylights of second floor, the rolled-iron beams of third floor, and cast channel irons forming reveals to jambs of interior windows, the rolled-iron beams and corrigated iron arching and cast iron ventilator and skylight of roof, the wrought and cast iron stair-
82 cases from basement to third floor, and the revolving shutters at openings to front of first story, all as exhibited on the drawings marked Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, described, in the specification and called for in the schedule. Copies of the advertisement, the specification, and schedule are attached hereto and form a part of this contract, and the work is to be performed in full accordance with the terms thereof. All the material used is to be of the very best quality and character, and the work is to be performed in the most skillful and workmanlike manner, and both materials and work in its details and when completed are to be to the entire and complete satisfaction of the party of the first part.

The whole of the work must be delivered and put in place at such time or times as may be required by the party of the first part and the progress of the work on the building; the entire work to be completed on or before the fifteenth day of September, eighteen hundred and seventy-six.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said party of the second part or his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of fourteen thousand five hundred and eighty-one dollars and seventy-eight cents ($14,581.78).

Payments to be made in the following manner, viz:

Ninety per cent. (nine-tenths) of the value of the work put
83 in place will be paid, from time to time, as the work progresses, in monthly payments (the said value to be ascertained by the

party of the first part), and ten per cent. thereof (one-tenth) will be retained until the completion of the entire work and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by said party of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of said party of the first part.

It is further covenanted and agreed by and between the parties to this contract that if from any cause whatever the said party of the second part should fail in required promptness in putting said work in place by or within the time or times specified above it shall become the duty of the said party of the first part, and he shall be and hereby is authorized and empowered, after eight days' due notice thereof, in writing, served personally upon or left at the shop, office, or usual place or [of] abode of the said party of the second part or with agent, without effect, to purchase and supply any deficiency of material or labor caused by the delinquency of the said party of the second part, and the actual cost thereof, together with fifteen per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States; or the said party of the first part may
84 elect that if the party of the second part should fail to put said work in place by or within the time or times specified above he shall forfeit the sum of fifty dollars ($50.00) per diem for each and every day thereafter until the final completion of the work, which sum shall be deducted from any moneys which may be due him; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of five thousand dollars ($5,000.00), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said party of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed shall be admitted to any interest in this contract, and that it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury, and that any assignment thereof, except as aforesaid, will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when
85 approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals this tenth day of December, A. D. 1875.

[On margin:] All erasures, alterations, and interlineations to be noted here before execution.

WM. A. POTTER,
Supervising Architect.

Witnesses to the signature of the supervising architect:

Two witnesses.

H. E. JACOBS.
RUFUS H. TAYLOR.

JOHN McARTHUR. [SEAL.]

Witnesses to the signature of the contractor:

Two witnesses.

P. A. HOYNE.
NORMAN HALL.

Bond.

Know all men by these presents that we, John McArthur, of city of Chicago, county of Cook, and State of Illinois, principal, and Edwin Walker, of Chicago, county of Cook, and State of Illinois, and John Cox, of Chicago, county of Cook, and State of Illinois, sureties, are held and firmly bound unto the United States of America in the sum of five thousand dollars ($5,000.00), to be paid as liquidated damages; for the payment of which, well and truly to be
86 made to the United States, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, firmly by the- presents.

Sealed with our seals and dated this tenth day of December, A. D. 1875.

The condition of the above obligation is such that whereas the said John McArthur has entered into a certain contract, hereto attached, with Wm. A. Potter, supervising architect United States Treasury Department, acting for and in behalf of the United States, bearing date the tenth day of December, 1875:

Now, if the said John McArthur shall well and truly comply with all the conditions of said contract and shall perform all the undertakings therein stipulated by him to be performed, then this obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof the said John McArthur, Edwin Walker,

and John Cox have hereunto subscribed their hands and affixed their seals the day first above written.

Signed, sealed, and delivered in the presence of—

JOHN McARTHUR. [SEAL.]
EDWIN WALKER. [SEAL.]
JOHN COX. [SEAL.]

P. A. HOYNE.
NORMAN HALL.

87 NORTHERN DISTRICT ILLINOIS, } ss:
State of Illinois, County of Cook, }

Personally appeared before me, a U. S. commissioner in and for said district, the said Edwin Walker and John Cox, who signed the above obligation, and who made solemn oath that they are each worth five thousand dollars over and above their legal liabilities.

EDWIN WALKER. [SEAL.]
JOHN COX. [SEAL.]

Sworn to and subscribed as above written, before me this 10th day of December, 1875.

[SEAL.] PHILIP A. HOYNE,
U. S. Commissioner, Northern Dist. Illinois.

OFFICE OF THE U. S. DISTRICT COURT CLERK,
NORTHERN DISTRICT OF ILLINOIS,
CHICAGO, *December 10th, A. D.* 1875.

I hereby certify that Edwin Walker and John Cox, the sureties who have signed the foregoing bond, are known to me as residents of Chicago, Illinois, and citizens of the United States, and that I believe them to be amply sufficient security for the amount thereof, and that the bond is good.

[SEAL.] WM. H. BRADLEY,
Clerk of Dist. Court U. S., N. District Ills.

88 SOLICITOR'S OFFICE, *Dec. 23rd,* 1875.

Received contract of John McArthur, of Chicago, Ill., for certain wro't and cast iron work for the U. S. sub-treasury at San Francisco, Cal., dated Dec., 10th, 1875, $14,581.78, and bond for performance thereof, $5,000.00.

OFFICE OF THE SOLICITOR OF THE
TREASURY, *December 24th,* 1875.

Examined and found correct.

BLUFORD WILSON,
Solicitor of the Treasury.

Approved Dec. 27th, 1875.

B. H. BRISTOW, *Secretary.*

44504. B. 13.

89 (*Copy of Written Instrument Claimed under in Set-off.*)

Contract between the United States of America and John McArthur.

This contract, made and entered into by and between Wm. A. Potter, supervising architect United States Treasury Department, for and in behalf of the United States of America, of the first part, and John McArthur, of the city of Chicago and State of Illinois, to whom was awarded the contract for the supply of certain wrought and cast iron work for the United States court-house and post office at Lincoln, Nebraska, on his bid for the same, received under advertisement dated November 8, A. D. 1875, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish, deliver, fit, and put in place certain wrought and cast iron work required for the United States court-house and post office at Lincoln, Nebraska, comprising columns and pilasters of first story and rolled-iron beams, &c., of second and attic floors, all as exhibited by plans of said building, marked Nos. 2 and 3, described in the specifications, and called for in the schedule.

Copies of the advertisement dated November 8, 1875, of the specifications, schedule, and proposal are attached hereto and form
90 a part of this contract, and the work is to be performed in full accordance therewith. The party of the second part is to be allowed the use of any necessary scaffolding and machinery on the building belonging to the Government, but will be required to provide at his own expense all labor for erecting, moving, and working the same.

The whole of the work must be of the very best quality and workmanship and to the entire and complete satisfaction of the party of the first party.

The wrought and cast iron work is to be furnished and put in place at such times and in such quantities as may be required by the party of the first part and the progress of the work, the whole to be completed, if so required by the party of the first part, on or before February twenty-fifth, 1876.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said party of the second part or to his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of three thousand five hundred and eighty-one dollars and eighteen cents ($3,581.18).

Payments to be made in the following manner, viz: Ninety per cent. (nine-tenths) of the value of the work delivered and put in place will be paid, from time to time, as the work progresses, in monthly
91 payments (the said value to be ascertained by the party of the first part), and ten per cent. thereof (one-tenth) will be retained until the completion of the entire work and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part

in the event of the non-fulfillment of this contract to the entire satisfaction of said party of the first part.

It is further covenanted and agreed by and between the parties to this contract that if from any cause whatever the said party of the second part should fail in required promptness in the delivery and putting in place of said work by or within the times specified above, it shall become the duty of the said party of the first part, and he shall be and hereby is authorized and empowered, after eight days' due notice thereof, in writing, served personally upon or left at the shop, office, or usual place of abode of the said party of the second part or with his agent, without effect, to purchase and supply any deficiency of material or labor caused by the delinquency of the said party of the second part, and the actual cost thereof, together with fifteen per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States; or the said party of the first part may elect that if the party of the second part should fail to
92 deliver and put in place said work by or within the time or times specified above, he shall forfeit the sum of twenty-five dollars ($25.00) per diem for each and every day thereafter until the final completion of the work, which sum shall be deducted from any moneys which may be due him; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of one thousand dollars ($1,000.00), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said party of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed shall be admitted to any interest in this contract.

And it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury, and that any assignment thereof except as aforesaid will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the Secretary of the Treasury and not otherwise, and no
93 departure from its conditions shall be made without his written consent.

In witness whereof the parties have hereunto subscribed their names and affixed their seals this tenth day of December, 1875.

[On margin:] All erasures, alterations, and interlineations to be noted here before executed.

WM. A. POTTER, [SEAL.]
Supervising Architect.

Witnesses to the signature of the supervising architect:

Two witnesses.

H. E. JACOBS.
JAS. E. HILL.

JOHN McARTHUR. [SEAL.]

Witnesses to the signature of the contractor:

Two witnesses.

P. A. HOYNE.
NORMAN HALL.

NOTE.—In executing this contract and bond, when not a corporate body, each member of the firm should sign and seal. In a corporate body there should be attached to the contract a properly authenticated copy of the vote or order of the company authorizing the party signing to bind the company, and the corporate seal should be attached.

94 *Bond.*

Know all men by these presents that we, John McArthur, of the city of Chicago, county of Cook, and State of Illinois, principal, and Edwin Walker, of the city of Chicago, county of Cook, and State of Illinois, and John Cox, of the city of Chicago, county of Cook, and State of Illinois, sureties, are held and firmly bound unto the United States of America in the sum of one thousand dollars ($1,000.00), to be paid as liquidated damages; for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our hands and seals this tenth day of December, A. D. 1875.

The condition of the above obligation is such that whereas the said John McArthur has entered into a certain contract, hereto attached, with Wm. A. Potter, supervising architect United States Treasury Department, acting for and in behalf of the United States, bearing date the tenth day of December, A. D. 1875: Now, if the said John McArthur shall well and truly comply with all the conditions of said contract, and shall perform all the undertakings therein stipulated by them to be performed, then this obligation to be void; otherwise to remain in full force and virtue.

95 In testimony whereof the said John McArthur, Edwin Walker, and John Cox have hereunto subscribed their hands and affixed their seals the day first above written.

Signed, sealed, and delivered in the presence of—

Two witnesses to each signature.

P. A. HOYNE.
NORMAN HALL.

To all the signatures.

JOHN McARTHUR. [SEAL.]
EDWIN WALKER. [SEAL.]
JOHN COX. [SEAL.]

NORTHERN DISTRICT OF ILLINOIS, } ss:
State of Illinois, County of Cook, }

Personally appeared before me, a U. S. com-issioner in and for said district, the said Edwin Walker and John Cox, who signed the above obligation, and who made solemn oath that they are each worth five thousand dollars over and above their legal liabilities.

Sworn and subscribed, as above written, before me this 10th day of December, 1875.

[SEAL.]

PHILIP A. HOYNE,
U. S. Commissioner, N. D. Illinois.

EDWIN WALKER.
JOHN COX.

96 OFFICE OF THE U. S. DISTRICT COURT CLERK,
NORTHERN DISTRICT OF ILLINOIS,
CHICAGO, *December* 10, *A. D.*, 1875.

I hereby certify that Edwin Walker and John Cox, the sureties who have signed the foregoing bond, are known to me as residents of Chicago, Illinois, and citizens of the United States, and that I believe them to be amply sufficient for the amount thereof, and that the bond is good.

[SEAL.]

WM. H. BRADLEY,
Clerk District Court U. S., N. District Ill.

Contract of John McArthur, of Chicago, Ill., for certain wro't and cast iron work for U. S. court-h's- and post office at Lincoln, Neb., dated Dec. 10th, 1875, $3,581.18, and bond for performance thereof, $1,000.00.

OFFICE OF THE SOLICITOR OF THE TREASURY,
December 24, 1875.

Examined and found correct.

BLUFORD WILSON,
Solicitor of the Treasury.

Approved Dec. 27, 1875.

B. H. BRISTOW, *Secretary.*

44504. B. 13.

97 Endorsed: Filed Jan'y 17, 1878. Wm. H. Bradley, clerk.

98 Afterwards, to wit, on the twenty-eighth day of January, 1878, came the plaintiff, by its attorney, and filed in said clerk's office its similiter to the 1st plea and demurrer to the other pleas of Hopkinson, Mason, Alston, Steele, and Dobbins in said-entitled cause; which said similiter and demurrer are in the words and figures following, to wit:

99 *Similiter to 1st Plea and Demurrer to Residue of Pleas of Hopkinson, Mason, Alston, Steel, and Dobbins.*

In the Circuit Court of the United States of America for the Northern District of Illinois. December Term, 1877.

THE UNITED STATES, etc.,
vs.
JOHN MCARTHUR and Others. } No. 15205. Debt.

Similiter to 1st Plea of Hopkinson and Others.

And the said plaintiffs, as to the plea of the said Charles Hopkinson, Carlisle Mason, John Alston, James Steel, and Thomas S. Dobbins by them first above pleaded, and whereof they have put themselves upon the country, do the like.

Demurrer to Residue of their Pleas.

And the said plaintiffs, as to the second, third, fourth, fifth, sixth, and seventh pleas of the said Charles Hopkinson, Carlisle Mason, John Alston, James Steel, and Thomas S. Dobbins by them above pleaded, say that those pleas and each and every of them and each and every part of the same, respectively, and the matters therein contained, in manner and form, etc., are not sufficient in law to bar the said plaintiff, etc., and that they are not bound by law to answer the same; and this they are ready to verify. Wherefore, for want of sufficient pleas or plea in this behalf, the plaintiffs pray judgment, etc.

Special Causes.

And for special causes of demurrer the said plaintiffs show to the court here the following—that is to say:

The said fourth and fifth pleas of the last-named defendants do not answer all the said assignments of breach, and especially
100 the said sixth assignment of breach, although those pleas purport to answer the whole of the said declaration.

All the said pleas of the last-named defendants above demurred to are, and each and every of them is, insufficient, uncertain, and informal.

MARK BANGS,
United States Attorney.

(Endorsed:) Filed Jan'y 28, 1878. W. H. Bradley, clerk.

101 On the same day, to wit, on the twenty-eighth day of January, 1878, came the plaintiff, by its attorney, and filed in said clerk's office its similiter to the 1st, 6th, 7th, and 8th pleas and demurrer to residue of pleas of John McArthur in said entitled cause; which said similiter and demurrer are in the words and figures following, to wit:

102 *Similiters to 1st, 6th, 7th, and 8th Pleas and Demurrer to Residue of Pleas of John McArthur.*

In the Circuit Court of the United States of America for the Northern District of Illinois. December Term, 1877.

THE UNITED STATES, etc.,
vs.
JOHN MCARTHUR and Others. } No. 15205. Debt.

Similiters to 1st, 6th, 7th, & 8th Pleas of McArthur.

And the said plaintiffs, as to the first, sixth, seventh, and eighth pleas of the said John McArthur by him above pleaded, and whereof he has put himself upon the county, do the like.

Demurrer to Residue of His Pleas.

And the said plaintiffs, as to the second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteen, and sixteenth pleas of the said John McArthur by him above pleaded, say that those pleas and each and every of them and each and every part of them, respectively, and the matters therein contained, in manner and form, etc., are not sufficient in law to bar the said plaintiffs, etc., and that they are not bound by law to answer the same; and this they are ready to verify. Wherefore, for want of sufficient pleas or plea in this behalf, the said plaintiffs pray judgment, etc.

Special Causes.

And for special causes of demurrer the said plaintiffs show to the court here the following—that is to say:

The said fourth and fifth pleas of the said John McArthur mention only a sum of money in the singular, and therefore do not answer all the said assignments of breach, and especially the said sixth assignment of breach, although those pleas purport to answer
103 the whole of the said declaration.

All the said pleas of the said John McArthur above demurred to are, and each and every of them is, insufficient, uncertain, and informal.

MARK BANGS,
United States Attorney.

Endorsed: Filed Jan'y 28, 1878. W. H. Bradley, clerk.

Afterwards, to wit, on the twenty-ninth day of January, 1878, came John McArthur, by his attorney, and filed in said clerk's office his joinder in demurrer in said entitled cause; which said joinder is in the words and figures following, to wit:

104 *Joinder in Demurrer of John McArthur.*

In the Circuit Court of the United States for the Northern District of Illinois.

THE UNITED STATES, etc., *vs.* JOHN MCARTHUR & *als.* } No. 15205. Debt.

And the said defendant, John McArthur, saith that each of his said second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, & sixteenth pleas and the matters therein respectively contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having and maintaining his aforesaid action thereof against him, the said defendant, and the said defendant is ready to verify and prove the same when, where, and in such manner as the said court here shall direct and award. Whereupon, and inasmuch as the said plaintiff hath not answered the said several pleas nor thereto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendant, &c.

JOHN BORDEN,
Att'y for McArthur.

(Endorsed:) Filed Jan'y 29, 1878. W. H. Bradley, clerk.

105 Afterwards, to wit, on the fifth day of February, 1878, came Charles Hopkinson, Carlisle Mason, John Alston, James Steel, and Thomas S. Dobbins, by their attorneys, and filed in said clerk's office their joinder in demurrer to 2d, 3rd, 4th, 5th, 6th, & 7th pleas in said entitled cause; which said joinder is in the words and figures following, to wit:

106 *Joinder in Demurrer to 2nd, 3rd, 4th, 5th, 6th, & 7th Pleas.*

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court of the United States for the Northern District of Illinois.

THE UNITED STATES *vs.* JOHN MCARTHUR *et al.* } Debt.

And the defendants, Charles Hopkinson, Carlisle Mason, John Alston, James Steel, and Thomas S. Dobbins, say that their said

pleas by them secondly, thirdly, fourthly, fifthly, sixthly, and seventhly above pleaded and the matters therein and in each of them contained, in manner and form as the same are above pleaded, are sufficient and each of said pleas is sufficient in law to bar the plaintiff from having his aforesaid action; and these defendants are ready to verify the same as the court here shall direct. Wherefore, inasmuch as the plaintiff has not denied said pleas or either of them, the said defendants pray judgment, and that the plaintiff may be barred from having his aforesaid action, &c.

CHARLES HOPKINSON,
CARLISLE MASON,
JOHN W. ELA, *Att'y for* JOHN ALSTON,
JAMES STEEL, &
THOMAS S. DOBBINS, *Def'ts.*

(Endorsed:) Filed Feb. 5th, 1878. W. H. Bradley, clerk.

107 [On margin:] B. May 21, '78. C.

Afterwards, to wit, on the twenty-first day of May, in the adjourned May term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiffs to the second, third, fourth, fifth, sixth, and seventh special pleas of the defendants, Carlisle Mason, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, and after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed to a future day.

108 [On margin:] B. May 24, '78. C.

Afterwards, to wit, on the twenty-fourth day of May, in the adjourned May term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

Now come again the parties, by their attorneys, and now comes on further to be heard the demurrer of the plaintiffs to the second, third, fourth, fifth, sixth, and seventh special pleas of the defendants, Carlisle Mason, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, and also comes on to be heard the demurrer of the plaintiffs to

the second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth special pleas of the defendant, John McArthur, and after hearing the arguments of counsel on both demurrers the court takes the same under advisement.

109 [On margin:] B. July 8, '78. C.

Afterwards, to wit, on the eighth day of July, in the July term of said court, 1878, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

The court, having considered and being now sufficiently advised upon the demurrer of the plaintiff to the second, third, fourth, fifth, sixth, and seventh special pleas of the defendants, Carlisle Mason, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, sustains said demurrer to the second, third, fourth, fifth, and sixth special pleas and overrules as to the seventh special plea, and, being also sufficiently advised upon the demurrer of the plaintiffs to the second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth special pleas of the defendant, John McArthur, sustains the same to the second, fifth, ninth, eleventh, thirteenth, fourteenth, fifteenth, and sixteenth special pleas and overrules it as to the tenth and twelfth special pleas.

110 And the defendant, John McArthur, by his attorney, confesses the demurrer of the plaintiff to his fourth special plea, and, on motion of the defendants, by their attorney, leave is given them to amend their special pleas by the first of September next.

Afterwards, to wit, on the thirteenth day of September, 1878, came John McArthur, by his attorney, and filed in said clerk's office his amended fourth and fifth pleas in said entitled cause; which said amended pleas are in the words and figures following, to wit:

111 *Amended 4th and 5th Pleas of Defendant, John McArthur.*

THE UNITED STATES OF AMERICA, }
Northern District of Illinois. }

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR & *als.* } Debt.

And now comes the said defendant, John McArthur, by John Borden, his attorney, and, submitting to the demurrer sustained to his fourth and fifth pleas and relying and insisting on the sufficiency of each and all others of his said pleas, by leave of the court first

obtained, amends his said fourth and fifth pleas, so that the same, as amended, are as follows:

4. And, for a further plea in this behalf, to each count of said declaration and to each breach therein assigned, excepting the sixth breach, by leave, &c., the said defendant says *actio non*, because he says that at the time therein alleged or at any time he did not have in his hands the sum of money therein mentioned or any part thereof, nor any balance of moneys which had come to his hands as deputy postmaster and from the sources therein alleged, or any of them; and of this the defendant puts himself upon the country, &c.

5. And, for a further plea in this behalf, as to each count of said declaration and each breach therein assigned, excepting the sixth breach, by leave, &c., the said defendant says *actio non*, because he says that he did pay to said plaintiff the said sum of money which came into his hands as deputy postmaster, as therein alleged, when thereunto requested; and of this the said defendant puts himself upon the country, &c.

JOHN BORDEN,
Att'y for John McArthur.

(Endorsed:) Filed Sept. 13, 1878. Wm. H. Bradley, clerk.

112 Afterwards, to wit, on the second day of November, 1878, came the plaintiff, by its attorney, and filed in said clerk's office its replications to the amended 4th and 5th pleas and to the 10th and 12th pleas of John McArthur in said entitled cause; which said replications are in the words and figures following, to wit:

113 *Replications to Amended 4th and 5th Pleas and to 10th and 12th Pleas of Def't McArthur.*

In the Circuit Court of the United States for the Northern District of Illinois. October Term, 1878.

Similiter to 4th & 5th amended pleas.

THE UNITED STATES, etc.,
vs.
JOHN MCARTHUR and Others. } No. 15205. Debt.

And the said plaintiffs, as to the amended fourth and fifth pleas of the said John McArthur by him above pleaded, and whereof he has put himself upon the country, do the like.

Replication de Injuria to 10th & 12th Pleas.

And the said plaintiffs, as to the plea of the said John McArthur by him tenthly and twelfthly above pleaded, say that, by reason of anything in those pleas alleged, the said plaintiffs ought not to be barred, etc., because they say that the said John McArthur, of his own wrong and without the causes or any or either of them in those pleas respectively assigned, committed the several breaches

in those pleas respectively mentioned; and this the said plaintiffs pray may be inquired of by the country, etc.

MARK BANGS,
United States Attorney.

(Endorsed:) Filed Nov. 2, 1878. Wm. H. Bradley, clerk.

114 Afterwards, to wit, on the tenth day of October, 1879, came the plaintiff, by its attorney, and filed in said clerk's office its replication to the seventh plea of Charles Hopkinson, Carlisle Mason, *et al.* in said entitled cause; which said replication is in the words and figures following, to wit:

115 *Replication to Seventh Plea of Hopkinson et al.*

In the Circuit Court of the United States of America for the Northern District of Illinois. October Term, 1879.

THE UNITED STATES, etc.,
vs.
JOHN MCARTHUR and Others. } No. 15205. Debt.

And the said plaintiffs (by leave of the court, etc.), as to the plea of the said Charles Hopkinson, Carlisle Mason, John Alston, James Steel, and Thomas S. Dobbins by them seventhly above pleaded, say that they, the said plaintiffs, by reason of anything in that plea alleged, ought not to be barred, etc., because they say that they were not nor are indebted to the said John McArthur in manner and form as is above in that plea alleged; and this the said plaintiffs pray may be inquired of by the country, etc.

JOSEPH B. LEAKE,
United States Attorney.

(Endorsed:) Filed Oct. 10, 1879. Wm. H. Bradley, clerk.

116 [On margin:] B. Dec. 18, '79.

Afterwards, to wit, on the eighteenth day of December, in the December term of said court, 1879, in the record and proceedings thereof in said entitled cause, before Hon. Henry. W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

On motion of W. C. Goudy, Esq., this cause is continued for the term.

117 [On margin:] B. May 31, '80. C.

Afterwards, to wit, on the thirty-first day of May, in the adjourned May term of said court, 1880, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

Upon the motion of the United States attorney for the said plaintiffs, leave is given them by the court to amend their declaration in this cause by striking out the words "eight thousand two hundred and forty-four dollars and seven cents" in the second and fourth assignments of breach in the said declaration contained, and in lieu of those words inserting the words "twenty-three thousand five hundred and thirteen dollars and fifty-one cents," and it is ordered by the court that the said declaration stand amended accordingly.

118 [On margin:] B. M'ch 6, '82.

Afterwards, to wit, on the sixth day of March, in the adjourned March term of said court, 1882, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR *et al.* } Debt.

On motion of the district attorney it is ordered by the court that this cause be continued.

119 [On the margin:] G. May 11, 1886.

Afterwards, to wit, on the eleventh day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR, CARLISLE MASON, SOLOMON MCKICHAN, John Alston, James Steel, Thomas S. Dobbins, and Charles Hopkinson, Impleaded with Rosell M. Hough. } Debt.

Now comes the district attorney, and this cause being now called for trial, now come also the defendants, John McArthur, Carlisle Mason, and John Alston, by William C. Goudy, Esq., their attorney, and the district attorney suggests to the court the death of the defendant, Charles Hopkinson; and, on motion of the district attorney, it is ordered that this cause abate as to him, and the district attorney now moves that said defendant, Solomon McKechan, be

120 defaulted; and it appearing to the court that said Solomon McKichan had been duly served with process and has failed to plead, and he being now ruled to plead instanter, and he failing to plead or answer the rule, and said Solomon McKichan being now three times solemnly called, comes not, but makes default, it is thereupon considered by the court that his default be entered, and that the plaintiffs have and recover of him their debt named in this declaration; and now comes on to be heard the demurrer of the plaintiffs to the third plea of the defendant, John McArthur; and, after hearing the arguments of the counsel, the court sustains said demurrer, and the defendants, John McArthur, Carlisle Mason, and John Alston, by their said attorney, now object to going to trial herein for the reason that the issues are not completely made up; and the court, being now fully advised upon said objections, overrules the same, to which said defendants, by their attorney,
121 now except; and, upon issues joined upon the pleas of the defendants, John McArthur, Carlisle Mason, John Alston, James Steel, and Thomas Dobbins, thereupon comes a jury of good and lawful men, to wit, Rufus King, L. M. Hollister, John H. Murphy, W. W. Clemens, George W. Watts, William B. Werden, Joseph Ellicott, P. R. Downey, L. F. Farnham, Jesse Tallcott, Patrick Grady, and W. O. Osgood, who were all duly elected, tried, and sworn well and truly, to try said issues and to assess the damages as to said defendant, Solomon McKichan; and, after hearing part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

122 [On the margin:] May 12, '86. G.

Afterwards, to wit, on the twelfth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR, CARLISLE MASON, *et al.*, &c. } Debt.

Now come again the district attorney and the defendants, John McArthur, Carlisle Mason, and John Alston, by their said attorney, and now come also the jury in this behalf empanneled and sworn, and said defendants, Carlisle Mason and John Alston, move for leave to amend their seventh plea herein, and, after hearing the arguments of the counsel, the court overrules said motion; and, after hearing the concluding evidence and the arguments of the counsel and receiving the instructions of the court, the jury retire
123 to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issues for the plaintiffs, and we find the plaintiffs' debt in the sum of three hundred thousand dollars, and assess the damages at one hundred and sixteen thousand five hundred and fifty-nine dollars and fourteen cents.

And thereupon the defendants, John McArthur, Carlisle Mason, and John Alston, by their attorney, move the court for a new trial herein.

124 [On the margin:] G. July 8, '86.

Afterwards, to wit, on the eighth day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR, CARLISLE MASON, JOHN ALSTON, JAMES STEELE, THOMAS S. DOBBINS, and SOLOMON MCKICHAN. } Debt.

Now comes the district attorney, on behalf of the United States of America, and now come also said defendants, John McArthur, Carlisle Mason, and John Alston, by William C. Goudy, Esq., their attorney, the defendants James Steele, Thomas S. Dobbins, and Solomon McKitchan failing to appear in person or by attorney; and the district attorney, for the said United States of America,
125 moves the court to amend the declaration herein so as to make the same conclude to the damage of the said plaintiffs of three hundred thousand dollars; and, after hearing the arguments of counsel upon said motion, the court takes the same under advisement; and the district attorney, on behalf of said plaintiffs, now enters a remittitur in the sum of seven thousand nine hundred and ten dollars and sixty-four cents upon the verdict heretofore entered herein.

And now comes on to be heard the motion of said defendants, John McArthur, Carlisle Mason, and John Alston, for a new trial of this cause; and, after hearing the arguments of the counsel upon said last-named motion, the court takes the same under advisement.

126 [On the margin:] July 14, '86. G.

Afterwards, to wit, on the fourteenth day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
JOHN MCARTHUR, CARLISLE MASON, JOHN ALSTON, JAMES STEELE, THOMAS S. DOBBINS, and SOLOMON MCKICHAN, Impleaded, &c. } Debt.

On this day here again comes the district attorney, for the said

United States, and also come the said John McArthur, Carlisle Mason, and John Alston, by William C. Goudy, their attorney aforesaid, none appearing for the said James Steele, Thomas S. Dobbins, and Solomon McKichan; and the court, having considered the motion of the district attorney of the United States to amend the declaration
127 herein so as to make the same conclude to the damage of the said United States of three hundred thousand dollars, and being now fully advised concerning the same, allows the said motion and orders that the said declaration stand amended accordingly.

And the court having also considered the motion of the said John McArthur, Carlisle Mason, and John Alston for a new trial of this cause, and being now fully advised concerning the same, denies and overrules the said motion for a new trial.

And thereupon the said John McArthur, Carlisle Mason, and John Alston, by their attorney aforesaid, move the court to arrest judgment upon the verdict herein, and the court, having considered and being now fully advised concerning the said motion in arrest of judgment, denies and overrules the same; and the district attorney, for the said United States, now moving for judgment upon the verdict aforesaid, and having heretofore remitted the sum of
128 seven thousand nine hundred and ten dollars and sixty-four cents of the damages found and assessed by the said verdict, and the court being now fully advised concerning the premises, it is thereupon considered and adjudged by the court that the said United States of America do have and recover against the said John McArthur, Carlisle Mason, John Alston, James Steele, Thomas S. Dobbins, and Solomon McKichan, impleaded, &c., the sum of three hundred thousand dollars, the debt in the said declaration mentioned, together with the costs and charges of the said United States of America by them about their suit in this behalf expended, and that the said United States of America have execution thereof, to be satisfied upon making the sum of one hundred and eight thousand six hundred and forty-eight dollars and fifty cents, their damages in this behalf, and their costs and charges aforesaid, taxed at the sum of — dollars and — cents.

129 And thereupon, at the instance of the said John McArthur, Carlisle Mason, and John Alston, it is ordered by the court that they have thirty days from this day in which to present and file a bill of exceptions in this behalf.

130 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States of America for the Northern District of Illinois.

THE UNITED STATES
vs.
JOHN MCARTHUR and Others. } No. 15205. Debt.

Be it remembered that on the trial of this cause the plaintiffs, to maintain the issues on their part, introduced in evidence a certified copy of bond as follows:

(E.)

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST OFFICE DEPARTMENT.

I, J. M. McGrew, auditor of the Treasury for the Post Office Department, do hereby certify the annexed to be a true and correct copy of the original bond, dated January 10th, 1873, of John McArthur, late postmaster at Chicago, in the State of Illinois, pertaining to his accounts in the office of the sixth auditor of the Treasury.

131 In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of [SEAL.] Washington, this twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

J. M. McGREW, *Auditor.*

Directions.

Read the directions.

☞ Insert the names of the sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed and the certificate should be signed by a mayor, judge, or justice of the peace, adding his official title; or, if signed by a notary public, he should affix his seal. Correct the name of the postmaster if wrongly written, and his first name should be signed in full.

Insert the names of sureties and place of residence.

Know all men by these presents that we, John McArthur, of Chicago, in the county of Cook, State of Illinois, and Rossell M. Hough, Carlisle Mason, Solomon McKechan, John Alston, James Steel, Oramel S. Hough, Thomas S. Dobbins, Charles Hopkinson, all of the city of Chicago, county of

132 Cook, and State of Illinois, are held and firmly bound unto the United States of America in the just and full sum of ($300,000) three hundred thousand dollars; for the payment whereof,

well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Insert the date.

In witness whereof we have hereunto subscribed our names and affixed our seals this tenth day of January, in the year of our Lord one thousand eight hundred and seventy-three.

The condition of this obligation is such that whereas the above-bounden John McArthur was appointed deputy postmaster at Chicago aforesaid on the 20th day of December, 1872, which said appointment was, on the 20th day of December, 1872, confirmed by the Senate of the United States:

Now, if the said John McArthur shall well and truly execute the duties of said office according to law and the instructions of the Postmaster General, and faithfully, once in three months or oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance
133 of all moneys that shall come to his hands for postage collected, postage stamps, and stamped envelopes sold, or money orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster General of the United States for the time being, and shall keep safely, without loaning, using, depositing in other banks or exchanging for other funds than as allowed by law, all the public money collected by him or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster General to be transferred or paid out, and, when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General; and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, branks, mail keys, and other property and papers which he, as
134 postmaster or as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department, then the above obligation shall be void; otherwise of force. And it is hereby expressly agreed and stipulated that, in case the said John McArthur, postmaster, shall, during his term of office, execute a new bond with different sureties, all the parties to the above obligation shall be held and bound for all charges against the said postmaster up to the end of the quarter during which such new bond shall be executed, and the acceptance of such new bond, when-

Postmaster should sign his first name in full.

ever the same may be signified by the Postmaster General, shall date from the last day of such quarter.

JOHN McARTHUR. [SEAL.]
ROSELL M. HOUGH. [SEAL.]
CARLISLE MASON. [SEAL.]
SOLOMON McKICHAN. [SEAL.]
JOHN ALSTON. [SEAL.]
JAMES STEEL. [SEAL.]
ORAWEL S. HOUGH. [SEAL.]
THOMAS S. DOBBINS. [SEAL.]
CHARLES HOPKINSON. [SEAL.]

Have a witness to the signatures.

Witness:
WM. T. HUGHES.
P. A. HOYNE.

(See over for affidavit.)

135 STATE OF ILLINOIS, *ss:*

I hereby certify that Rosell M. Hough, Carlisle Mason, Solomon McKichan, John Alston, James Steel, Orawel S. Hough, Thomas S. Dobbins, and Charles Hopkinson, the sureties above named, and who have signed the foregoing bond, are responsible and sufficient to insure the payment of double the entire penalty named therein.

Witness my hand this 13th day of January, A. D. 1873.

PHILIP A. HOYNE,
U. S. Commissioner,
Northern District, Illinois.

[COMMISSIONER'S SEAL.]

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Rosell M. Hough, Carlisle Mason, Solomon McKichan, John Alston, James Steel, Orawel S. Hough, Thomas S. Dobbins, Charles Hopkinson, sureties, being duly sworn, depose and say and each for himself deposes and says he has executed the within bond, and that his place of residence is correctly stated therein; that he is a freeholder of said State, and that he is worth the sum here set against his name over and above all debts and liabilities existing against him, the total sum thus assured amounting to ($600,000) six hundred thousand dollars.

136

[NOTARIAL SEAL.]

ROSELL M. HOUGH.	$100,000.
CARLISLE MASON.	$60,000.
SOLOMON McKICHAN.	$100,000.
JOHN ALSTON.	$100,000.
JAMES STEEL.	$75,000.
ORAWEL S. HOUGH.	$100,000.
THOMAS S. DOBBINS.	$100,000.
CHARLES HOPKINSON.	$100,000.

Subscribed and sworn to before me this 10th day of January, 1873.

W. T. HUGHES,
Notary Public.

STATE OF ILLINOIS, }
County of Cook, } ss:

I, Joseph Pollak, clerk of the county court of Cook county, the same being a court of record, do hereby certify that William T. Hughes, whose genuine signature appears to the foregoing affidavit and certificate, was, at the time of signing the same, a notary public in and for the county and State aforesaid, duly qualified, and that all his official acts as such are entitled to full faith and credit.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court, at Chicago, on this thirteenth day of January, 1873.

[Seal County Court, Cook County, Illinois.]

JOS. POLLAK,
Clerk County Court, Cook Co., Ills.

P. 8 & M. O.

M. O.	100,000
P.	200,000
	300,000

(Endorsed:) E. Chicago, Ills., Cook Co. John McArthur. $300,000. Date of app't, 20 Dec., 1872. Date of bond, 10 Jan., 1873.

137 The plaintiffs next introduced in evidence a statement of the general postal account of the defendant, John McArthur, as postmaster, certified by the sixth auditor under the seal of his office, the certificate bearing date the 20th November, 1877, which statement comprised the period from the 16th February, 1873, to the 10th March, 1877, inclusive, and showed a balance of $52,123.74 due from McArthur. It also appeared from this statement that on the 14th of April, 1877, he was credited with $11,803.98 deposited in the U. S. Treasury, and there was other testimony to the effect that this sum was a part of the proceeds of certain bonds theretofore deposited by the Cook County National Bank to secure the United States against loss of any funds which should be deposited in that bank by officers of the United States.

The plaintiffs then introduced in evidence a supplemental statement of the general postal account of the defendant McArthur, as postmaster, certified by the sixth auditor under the seal of his office, the certificate bearing date of the 1st May, 1880, which statement showed an additional charge of $19.34, making the total balance due on that account $52,143.08.

138 The plaintiffs then introduced in evidence a statement of the money-order account of the defendant McArthur, as postmaster, certified by the sixth auditor under the seal of his office the certificate bearing date of the 20th November, 1877, which state

ment covered the period from the 22d February, 1873, to the 10th March, 1877, inclusive, and showed a balance of $8,244.07 due from McArthur on that account.

The plaintiffs next introduced in evidence a further statement of money-order account, which statement, with its annexed certificate, is as follows:

(A.)

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST OFFICE DEPARTMENT.

I, F. B. Lilley, acting auditor of the Treasury for the Post Office Department, do hereby certify the annexed to be a true and correct transcript from the money-order account books of the Post Office Department of the account of John McArthur, late postmaster at Chicago, in the State of Illinois.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of Washington, this tenth day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

F. B. LILLEY,
Acting Auditor.

139 *John McArthur, Late Postmaster at Chicago, Illinois, in Money-Order Account with the United States.*

	DR.		CR.
Mar. 10, 1877.	To balance due United States per transcript furnished to U. S. attorney-----		
	" money orders issued----	$8,244 07	
	" fees on same----------		
Feb. 10, '80.	" amount improperly claimed by John McArthur on account of money orders alleged to have been paid, which amount has been transferred to the credit of F. W. Palmer, P. M., Chicago, Ills.----------	14,865 91	
	By money orders paid------		
	" " " repaid ----		
	" deposit----------		
	Balance ----------		$23,109 98
		$23,109 98	23,109 98
	To balance due the United States----------	$23,109 98	

140 And the defendants, John McArthur, Carlisle Mason, and John Alston, severally objected to the receiving of the last-mentioned statement in evidence, because it appears to have been made after the commencement of this suit, and because the auditor appeared to have charged therein against the defendant McArthur the sum of $14,865.91 by transferring that amount from the account of his successor, as postmaster, Frank W. Palmer, and because this was done without any notice to the defendant McArthur and without any evidence being furnished of the liability of him or his bondsmen therefor, and because the sixth auditor could not change the account and thereby increase the liability of the defendant McArthur or the other defendants after the court had acquired jurisdiction of the subject-matter of this suit, so as to make the auditor's action evidence against them or any of them; but the court overruled the objections and allowed the last-mentioned statement of account to be, and the same accordingly was, read in evidence to the jury; to which decision of the court the defendants, McArthur, Alston, and Mason, severally excepted.

141 Frank W. Palmer was then called as a witness by the plaintiffs, and testified that the term of office of the defendant McArthur, as postmaster at Chicago, expired the 10th March, 1877, and on the same day the witness entered upon the duties of the office of postmaster at that place and continued to hold the office until June, 1885. He further testified that on or before the 27th June, 1877, he presented a draft of the Post Office Department upon the defendant McArthur, dated the 17th April, 1877, for $52,129.94, and demanded payment thereof by letter sent by mail to his address and received no answer to the letter, and that on the day last mentioned (27 June, 1877) the witness made like demand upon the several sureties by letters sent by mail to their addresses, respectively, but received no answer from any of them; also that he made demand for the balance of money-order funds, as first claimed, but was unable to say from memory when or for what amount such demand was made. The district attorney then showed to the witness and offered in evidence an authenticated copy of certificate as follows:

142 (A.)

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST OFFICE DEPARTMENT.

I, F. B. Lilley, acting auditor of the Treasury for the Post Office Department, do hereby certify the annexed to be a true and correct copy of the original certificate, dated February 25, 1880, of F. W. Palmer, postmaster at Chicago, Illinois, pertaining to the accounts of John McArthur, late postmaster at Chicago, in the State of Illinois, in the office of the sixth auditor of the Treasury.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of Washington, [SEAL.] this tenth day of March, in the year of our Lord one thousand eight hundred and eighty, 1880.

F. B. LILLEY,
Acting Auditor.

POST OFFICE, CHICAGO,
COOK COUNTY, ILLINOIS, *Feb.* 25, 1880.

I, Frank W. Palmer, postmaster at Chicago, Illinois, employed by the auditor of the Treasury for the Post Office Department for that purpose, hereby certify that I made demand for payment of $23,109.98 on John McArthur, late postmaster at Chicago, Ills., being a balance due the United States from him on his money-
143 order account as stated, by letter mailed on the 13th day of February, 1880, addressed to the said delinquent postmaster at Chicago, Illinois, his last usual place of abode; (*) that a sufficient time has elapsed in the ordinary course of mail for said letter to have reached its destination and a reply to have been received, and that payment of said balance as aforesaid has not been received within the time designated in my instructions from the auditor of the Treasury for the Post Office Department, to wit, ten days.

I further certify that I made demand for payment of said balance as aforesaid upon R. M. Hough, C. Mason, S. McKichan, John Alston, James Steel, O. S. Hough, Thos. S. Dobbins, and Charles Hopkinson, the sureties of said late and delinquent postmaster, by letters mailed on the 13th day of February, 1880, addressed to them at their last usual place of abode, and a sufficient time has elapsed in the ordinary course of mail for said letters to have reached their destination and replies to have been received, and that payment of said balance as aforesaid has not been received within the time designated in my said instructions from the auditor of the Treasury for the Post Office Department.

F. W. PALMER, *Postmaster.*

144 And thereupon the witness testified that he made demand, as set forth in this certificate, for the balance of money-order funds as finally claimed.

The defendant-, McArthur, Mason, and Alston, severally objected to the receiving of this copy of certificate in evidence, but the court overruled the objection and allowed the paper to be, and the same accordingly was, read in evidence; to which decision those defendants severally excepted.

And thereupon the plaintiffs rested.

The defendants, to maintain the issues on their part, then call- as a witness Augustus H. Burley, who testified that the Cook County National Bank suspended business on the 18th of January, 1875; that he was appointed receiver by the Controller of the Currency and took charge on the 8th of February, 1875, and that the business was wound up and a final report was made in January, 1884.

The defendants then introdued testimony to show that the Cook County National Bank was a national banking association doing business at Chicago for some years before January, 1875, and had

* If his place of abode is not known, then mail to the post office where the indebtedness accrued, and insert above in place of "his last usual place of abode" the following words: "The post office where the indebtedness accrued."

theretofore and before the appointment of an assistant treas-
145 urer of the United States at Chicago been designated as a depository for public money of the United States, under section 5153, R. S., by the Secretary of the Treasury.

The last-mentioned witness also testified, refreshing his memory from the books of the bank, that while it was doing business an account was kept with the collector of internal revenue for the first district of Illinois, and two accounts were kept with the defendant McArthur, as postmaster at Chicago, all such accounts showing deposits of money by those officers, respectively, and that one account with the latter was with "John McArthur, P. M," and the other was for money-order funds, and that there was due on those two accounts from the bank the 18th January, 1875, when it suspended, the sum of $39,584.

This witness also testified that it appeared from the book- and papers of the bank that at the time when it closed the bank had on deposit in the United States Treasury bonds of the face value of $150,000, which were sold by the Treasury Department and produced $174,582.02; that there was due from the bank when it sus-
pended for moneys deposited by the collector of internal
146 revenue the sum of $155,305.47, and that the Secretary of the Treasury directed the payment of that sum in full from the proceeds of the bonds and directed a credit to be given to the defendant McArthur, as postmaster, of the residue of those proceeds, namely, $19,239.05, leaving the sum of $20,344.95 unpaid and due from the bank; to which evidence the district attorney objected. It also appeared in evidence that (of the $19,239.05) the sum of $11,803.98 was credited in the statement of the general postal account under date of 14th April, 1875, as above mentioned, and the sum of $7,435.07 was credited in the statement of the money-order account under date of the 17th April, 1875.

It further appeared in evidence and by admission that there had been paid to the United States from the assets of the bank as dividends on the unpaid residue (of $20,344.95) above mentioned as follows: Dec. 21, 1876, on general postal account, $998.61; on money-order account, $628.99; Nov. 20, 1883, on general postal account, $886.42; on money-order account, $545.72; total, $3,039.74.

The defendant, John McArthur, was then called as a wit-
147 ness for the defense, and testified that he entered upon the duties of his office as postmaster at Chicago the 15th February, 1873, and retired the 10th March, 1877; that when his term began there was no assistant treasurer of the United States at Chicago; that the office of such assistant treasurer there was opened from four to six months thereafter; that when the witness became postmaster he found that his predecessor had been keeping an account of post-office money in the Union National Bank, and the witness did the same until the Cook County National Bank was designated as the depository, when, upon receiving orders from the officers of the Government, he changed the account from the Union National Bank to the Cook County National Bank, and continued to deposit in the latter bank until it suspended payment.

The witness further said that "postal funds" were the receipts from sales of postage stamps, box rents, and other receipts of the office, and a portion of the money was kept to pay the current expenses of the office; that the money-order funds were kept
148 separate from the other funds of the office and were subject to the control of the Money Order Division; that postal funds were deposited in the bank as "postmaster funds" and the money-order funds as "money-order business." The witness then testified that he received, soon after its date, a certain letter from the Post Office Department, and the letter was read in evidence as follows:

POST OFFICE DEPARTMENT,
OFFICE OF THE THIRD ASSISTANT POSTMASTER GENERAL,
WASHINGTON, D. C., *June* 14, 1873.

John McArthur, P. M., Chicago, Ills.

SIR: An ass't treasurer of the U. S. having been located in Chicago, all postal funds must be deposited with that officer in future instead of the P. M., and you are requested to instruct postmasters accordingly should any tender their funds to you for deposit.

After paying the outstanding drafts, a list of which is herewith enclosed, you will make daily depos-ts of the proceeds of your office, reserving a sufficient sum to meet the current expenses. In
149 case of failure to deposit on any given day you will promptly report to this office the cause thereof.

As no drafts will be drawn upon you hereafter, the rendition of the "monthly statement of receipts and disbursements" may be discontinued after the outstanding drafts shall have been accounted for.

Very respectfully, WM. M. IRELAND,
Act'g Third Ass't P. M. G.

The witness further testified that it was necessary to keep on hand, to meet the current expenses designated in the letter, from fifty to sixty thousand dollars, averaging that amount each month; that he deposited, as directed in the letter, funds with the assistant treasurer at Chicago, reserving a sufficient fund to meet the current expenses.

The witness also testified that he received a letter from Mr. Palmer, dated the 20th April, 1877, as testified by the letter, and that the witness answered this letter; and the defendants thereupon offered to read in evidence a copy of the answer mentioned,
150 but the district attorney objected, because the same was incompetent testimony, and the court sustained the objection; to which decision the defendants McArthur, Mason, and Alston severally excepted.

The paper so offered and executed is as follows:

APRIL 25TH, 1877.

Hon. F. W. Palmer, P. M., Chicago, Ills.

SIR: You letter notifying me of a draft having been drawn upon me by the Post Office Dep't for $52,129.94, and that the same is in your hands for collection, has been received.

In reply, I claim there is no such amount due from me to the Gov't. I call attention to the fact that the Cook County National Bank was a Government depository, and that my account there was well known to the Dep't, and that the same was authorized thereby. A large amount of money was required for the current expenses of the office, and I was instructed by the Dep't and especially by letter of date June 4, '73, to pay over to the sub-treasury at this place the excess above the amount required for current expenses as above.

151 I am entitled to the credit and deduction noted in my statements furnished to the Gov't, and also to a credit for all stoppages of money on my contracts with the Treasury Dep't, made in favor of the above claim, said to be due from me. I also paid Special Agent N. R. Hawley $675.00, of which the Dep't had notice, and that amount should have been charged to him and my account received credit for the same.

Respectfully yours, J. McARTHUR.

The defendants then introduced in evidence a contract made on behalf of the United States with the defendant McArthur, dated the 10th December, 1875, whereby the latter agreed to furnish the iron-work for a sub-treasury building at San Francisco, and was to receive therefor $14,581.78; also another contract made on behalf of the United States with the defendant McArthur, and bearing date the same day, whereby the latter agreed to furnish the iron-work for a court-house and post office at Lincoln, Nebraska, and was to receive therefor $3,581.18; and the defendants introduced *in*

152 evidence tending to prove that a balance was due from the United States to the defendant McArthur on these contracts, and that he was entitled to damages by reason of delay on the part of the officers of the United States in furnishing other materials for those buildings; and also offered evidence tending to prove the amount of such damages. The defendants also introduced in evidence a letter, dated the 15th March, 1882, from the sixth auditor, containing the statement that there had been allowed to the defendant McArther, on the contracts mentioned, the sum of $2,819.

Before offering in evidence the contracts the following letters were read in evidence:

Law Offices Goudy, Chandler & Skinner, 162 Washington street.

CHICAGO, 19*th June*, 1878.

United States Circuit Court, Northern District of Illinois.

THE UNITED STATES
v.
JOHN McARTHUR *et al.*, Sureties upon His Official Bond.

Claims for Allowance under § § 951 and 952 of the United States Revised Statutes.

153 DEAR SIR: As counsel for said sureties we herewith present to you several claims of credit, which we ask to be allowed in favor of the defendant sureties in this suit.

This application is made under sections 951 & 952 of the Revised Statutes of the United States, and, as the case now stands on the docket of the court for trial and is liable to be called during the coming week, we respectfully ask that you will consider this matter at once and immediately advise us of your conclusions thereon.

Yours very respectfully,

GOUDY, CHANDLER & SKINNER.

To the sixth auditor of the Post Office Department, Washington, D. C.

United States Circuit Court, Northern District of Illinois.

THE UNITED STATES *v.* JOHN MCAUTHER *et al.*, Sureties upon His Official Bond.	Claim of Credit Presented to the Post Office Department for Allowance under Sections 951 & 952 of the U. S. Rev. Stat.

John Alston, of the city of Chicago, in said district, respect-
154 fully says that this suit was brought upon the official — of the said John McArthur, conditioned for the faithful performance of his duties as postmaster of said city of Chicago; that said suit is now pending, awaiting trial, and that said deponent is one of the defendant sureties above named.

And the said Alston further says that said McArthur was postmaster as aforesaid from, to wit, the 10th day of January, A. D. 1873, until, to wit, the month of April, 1877, and that between the said two last-named dates and during his term of office as aforesaid the said John McArthur, as said postmaster, deposited with the Home National Bank of Chicago large sums of post-office monies, for which the said postmaster, McArthur, was duly credited upon a pass-book issued to him by the said bank, and entitled "The Home National Bank of Chicago in account with John McArthur, postmaster," and the said Alston now makes the following special statements, namely:

First. That on the 22nd day of June, A. D. 1873, the said Home National Bank had on deposit to the credit of said postmas-
155 ter, McArthur, a large amount of money, far exceeding in the aggregate the sum of ten thousand dollars, and that *and that* on the said last-named day the said bank wilfully and illegally, and without any written authority and without any proper or legal warrant, transferred the sum of ten thousand dollars from the post-office moneys on deposit with it, as last aforesaid, to the individual credit of the said John McArthur, and thereafter paid out the same upon his individual cheque.

Second. That on the 9th day of February, A. D. 1875, the said Home National Bank took a cheque of that date upon itself, payable to the order of its then cashier, signed "John McArthur, postmaster," for $4,100.00, and applied the same to the payment of the individual note of the said McArthur, that day due, to the said bank, with full knowledge that the said $4,100.00 were post-office moneys.

Third. That during the said term of office of the said postmaster,

McArthur, the said Home National Bank had on deposit the sum of twenty-five thousand dollars of moneys other than those hereinbefore stated, which were deposited with it by the said post-
156 master, McArthur, and for which he was credited in the said postmaster's pass-book first hereinbefore described, and that the said bank paid out the sum of twenty-five thousand dollars upon the individual cheque of the said McArthur.

Fourth. That on, to wit, the first, ninth, & tenth days of July, the eighth day of August, the ninth day of September, the fifth, seventh, & eighth days of November, and the twenty-seventh day of December, A. D. 1873, the said Home National Bank received of the said postmaster, McArthur, respectively, $2,000, $1,055, $1,000, $3,000, $2,000, $1,000, $1,000, $1,000, and $3,000 of post-office moneys, knowing them to be such, and placed them to the individual credit of John McArthur, and thereafter paid out the same and each and all thereof upon his individual cheque.

Fifth. That on the 19th day of January, A. D. 1875, the Cook County National Bank of Chicago, then a duly designated depository of the United States, suspended payment, having of post-office moneys deposited with it by the said postmaster, McArthur, by order of
157 the Postmaster General the sum of, to wit, $40,644.00, which, save the sum of $21,404.95, has never been recovered from the said Cook County National Bank.

And the said Alston says that the said moneys stated in the said "first," "second," "third," "fourth," and "fifth" special statements are the moneys or a part of them which are declared on in the declaration in this suit.

Sixth. That at the time of the commencement of this suit there was and ever since has been and now is due to the said John McArthur from the said United States, for work and material duly furnished for the sub-treasury building at San Francisco and the custom-house at Lincoln, Nebraska, the sum of five thousand dollars.

And the said Alston says that the moneys and each and all of them set out in the "first," second, "third," "fourth," "fifth," and "sixth" special statements are legal, equitable, just, and proper claims of credit which should be offset against the moneys and demands declared on in the declaration herein, and under sections 951 and 952 of the United States Revised Statutes he hereby re-
158 spectfully presents the foregoing claims of credit to the sixth auditor of the Post Office Department of the United States, and asks that the same and each and every of them be allowed as credits and set-offs in this suit.

GOUDY, CHANDLER & SKINNER,
Counsel for said Sureties.

NORTHERN DISTRICT OF ILLINOIS:

John Alston, of the city of Chicago, in said district, being duly sworn, deposes and says that he is the John Alston and defendant surety hereinbefore named; that he has read the foregoing paper writing, and that the statements therein contained are true to his

own knowledge, save as to those made upon information and belief, and as to those he believes the same to be true.

JOHN ALSTON.

Subscribed and sworn to before me this 19th day of June, A. D. 1878.

WILLIAM S. COMAN,
[SEAL.] *Notary Public.*

159 In your reply please quote above initials.

OFFICE OF THE AUDITOR OF THE TREASURY,
FOR THE POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *June* 27, 1878.

GENTLEMEN: I am in receipt of your letter of the 19th instant, transmitting several claims for credit which you ask to be allowed in favor of the defendants in the case of The United States *vs.* John McArthur *et al.*, sureties on his official bond as late postmaster at Chicago, Illinois.

The accounts, postal and money order, of John McArthur, as such late postmaster, have been adjusted by this office, and the suit above mentioned is for the recovery of balances found to be — to the United States under said adjustment.

The claims now presented for my consideration on the sworn special statements of John Aliston, one of the sureties on McArthur's official bond, seem to be the result of certain transactions between McArthur, in his official capacity and as an individual, and certain banks in the city of Chicago, and involve questions of law and fact which can quite properly be passed upon and decided by the Federal courts. With the object, therefore, of bringing them within the
160 provisions of sections 951 and 952 of the Revised Statutes of the United States, I hereby disallow entirely the five claims for credit made by Mr. Alston covering McArthur's transactions with the Cook County and Home National Banks of Chicago. In reference to the sixth claim made by Mr. Alston, that there is due to McArthur for work done on public buildings the sum of five thousand dollars, I herewith enclose a copy of a letter from the Assistant Secretary of the Treasury in reference to this matter, and hereby disallow the claims, because the amount due or to become due to McArthur cannot now be stated. When his account for the *this* work is finally audited whatever amount is found to be due him will be at once placed to his credit.

In conformity to the regulations of the Treasury Department, this letter will be forwarded to you through the United States district attorney for Chicago.

Respectfully,
(Signed) J. M. McGREW, *Auditor.*

Messrs. Goudy, Chandler & Skinner, attorneys-at-law, No. 162 Washington St., Chicago, Ills.

161 In the course of the testimony in regard to the claims under the contracts DAVID M. FORD was called as a witness for the defendants, and there was presented to him a memorandum, which he said was a copy of the account showing the amounts claimed by the defendant McArthur to be due to him from the United States on or by reason of the two contracts mentioned, and the following questions were put to the witness, and by him answered as follows, concerning that paper:

Q. For what purpose were these made out?

A. They were made out for him to take with him to Washington to present to the Government in an effort to settle this matter.

Q. What did you do with the original of this one?

A. I gave it to Mr. Ela; I think it was Mr. Ela, or Mr. Ray, the assignee.

Q. Who was Mr. Ray?

A. Mr. Ray was the assignee of Gen. McArthur.

Q. Assignee in bankruptcy?

A. Yes, sir.

Q. And Mr. Ela was the attorney?

A. Ela & Parker were the attorneys.

Q. Were these made out for the benefit of the assignee in bankruptcy?

A. Yes, sir.

Q. You made them for the assignee in bankruptcy?

162 A. To send to the attorneys at Washington; yes, sir.

Q. To be presented to whom?

A. To the proper authorities there.

Q. Who were the proper authorities? Did you send these?

A. I didn't send them. I gave them to the assignee or to Mr. Ela, I think.

It was here admitted as a fact in the case that the defendant McArthur, about the 24th day of February, 1877, was adjudicated and became a bankrupt and one Charles E. Ray was appointed and became his assignee in bankruptcy, and that the estate was settled up, except there was a balance in the hands of the assignee to be applied on this claim of the United States against McArthur.

All the testimony relating to a claim against the United States in favor of the defendant McArthur growing out of the two contracts for furnishing iron-work for public buildings was then excluded by the court; to which decision the defendants, McArthur, Mason, and Alston, severally excepted.

The defendant McArthur was then recalled as a witness for the defense, and testified that the item of $14,865.91, appearing

163 in the statement of money-order account certified by the sixth auditor under date of the 10th March, 1880, as transferred from the account of F. W. Palmer to the account of John McArthur, was not fixed by any agreement with the witness; that he never had any knowledge or information of any proposed change of the account in that respect; that he never had any hearing whatever in regard to the same, and he disputed its correctness. There-

upon the defendants, McArthur, Mason, and Alston, moved to exclude from the jury the certified statement last mentioned, but the court overruled the motion and refused to exclude the statement; to which decision those defendants severally excepted.

This was substantially all the evidence offered by the parties.

After the arguments of counsel to the jury the court charged the jury as follows:

164 *Charge to the Jury.*

Gen. McArthur was not authorized to deposit post-office funds in the Cook County National Bank after the sub-treasury was established at Chicago.

In addition to that, he received a letter from the Third Assistant Postmaster General as follows:

"An assistant treasurer of the United States having been located in Chicago, all postal funds must be deposited with that officer in the future instead of the P. M., and you are requested to instruct postmasters accordingly should any tender their funds to you for deposit."

He speaks now of his direction to the postmaster here himself:

"After paying the outstanding drafts, a list of which is herewith enclosed, you will make daily deposits of the proceeds of your office, reserving a sufficient sum to meet the current expenses. In case — a failure to deposit on any day you will promptly report to this office the cause thereof, as no drafts will be drawn upon you hereafter. The remission of a monthly statement of receipts and disbursements may be discontinued after the outstanding drafts shall have been accounted for."

165 What evidence is there, then, before you that the balances shown in these certified statements are incorrect? You take them as correct, and on the strength of them you will return a verdict for the United States for the several balances shown, unless there is evidence here which overcomes the presumption which the law creates in their favor.

You will allow nothing in the way of credits on account of work done and material furnished by John McArthur in connection with the public buildings at San Francisco and Lincoln, Nebraska. You will allow nothing to him in addition to what is allowed in these statements in evidence on account of the funds which the United States received from the sale of bonds which had been deposited with the Cook County National Bank as a designated depository.

The plaintiff is entitled to interest upon these several balances from the time the money was demanded of John McArthur, and if the evidence fails to show a demand made, then interest from the commencement of this suit.

If you find for the plaintiffs the form of your verdict will be, "We, the jury, find for the plaintiffs and assess damages at $—, and as to the other defendant, McKichen, we assess the damages at $—."

166 It is admitted, gentlemen, bear this in mind, that the defendants are entitled to credit for $3,039.74, which don't ap-

pear in any of these statements at all. That you will allow at such time as you think the money was paid on his account.

167 The defendants, McArthur, Mason, and Alston, severally excepted to so much of the charge as directed the jury to receive as correct the certified statements of the sixth auditor, and as to the certified statement showing a charge of $14,865.91 against John McArthur.

The same defendants also severally excepted to the following language of the court in the charge:

"You will allow nothing in the way of credits on account of work done and material furnished by John McArthur in connection with the public buildings at San Francisco and Lincoln, Nebraska. You will allow nothing to him in addition to what is allowed in the statements in evidence on account of the funds which the United States received from the sale of bonds which had been deposited with the Cook County National Bank as a designated depository."

Thereupon, at the request of the district attorney, the jury were allowed to take to the jury-room the certified statements of account introduced in evidence, the said defendants objecting; but the court overruled the objection and permitted the jury to carry those papers with them into the jury-room; to which decision the said defendants severally excepted. After the jury had returned into court a verdict in favor of the plaintiffs the defendants, McArthur, Mason, and Alston, entered and filed their motion for a new trial as follows:

168 In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES
vs.
JOHN MCARTHUR *et al.* } Debt.

And now come the defendants, John McArthur, John Alston, Carlisle Mason, and move for a new trial and to set aside the verdict of the jury for the following reasons:

1. The amount of the damages exceeds the sum claimed in the declaration.
2. The amount of the damages exceeds the principal and interest proven by the evidence.
3. The court admitted illegal evidence on the part of the plaintiff.
4. The court excluded legal evidence offered on the part of the defendants.
5. The court excluded evidence tending to prove the plea of set-off.
6. The court erred in its charge to the jury in directing the jury not to allow credits on account of work done and material furnished by the defendant McArthur upon the public buildings at San

169 Francisco, California, and Lincoln, Nebraska; and also in directing the jury to allow no credits to the said defendant McArthur in addition to what was allowed in the statements from the sixth auditor's office, offered in evidence by the plaintiff; and also in directing the jury not to allow any credits on account of the funds

which the United States received from the sale of bonds which had been deposited with the Cook County National Bank; and also in directing the jury not to allow any credit not found in said statements, except the sum of $3,039.74, the dividends from the Cook County National Bank; and also in stating to the jury that the defendant McArthur, as postmaster, was not authorized to deposit postal and money-order funds in the Cook County National Bank.

7. The court erred in allowing the jury to take the certified statements from the auditor's office to the jury-room.

W. C. GOUDY,
For Def'ts.

Endorsed: Filed June 1, 1886. Wm. H. Bradley, clerk.

170 Afterwards, on the 8th day of July, 1886, the district attorney moved to amend the declaration so as to make the same conclude to the damage of the United States of $300,000; and he also entered a remittitur of $7,910.64 of the damages assessed, and the motion to amend and the motion for a new trial were thereupon argued and heard.

And afterwards, on the 14th day of July, 1886, the court sustained the motion to amend the declaration and overruled the motion for a new trial; and the defendants, McArthur, Mason, and Alston, severally excepted to the decision granting an amendment of the declaration, and also to the decision denying the motion for a new trial.

Thereupon the defendants entered a motion in arrest of judgment, and assigned as reason therefor that the verdict exceeded the amount of damages sued for or claimed in the declaration, but the court denied the motion and rendered judgment upon the verdict, less the amount remitted; to which decision overruling the motion in arrest of judgment and rendering judgment for the amount of the verdict,

171 less the sum remitted, the defendants, McArthur, Mason, and Alston, severally excepted.

And forasmuch as the following facts do not appear fully of record, the defendants pray that this their bill of exceptions may be signed and sealed and made a part of the record, which is accordingly done.

W. Q. GRESHAM, [SEAL.]
Circuit Judge.

Endorsed: Filed August 13th, 1886. Wm. H. Bradley, clerk.

172 Afterwards, to wit, on the thirteenth day of October, 1886, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, John Alston, Carlile Mason, and Horatio J. Colvin, are held and firmly bound unto the United States of America in the full and just sum of five hundred

dollars, to be paid to the said United States, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a term of the circuit court commencing on the first Monday of July, 1886, and on July 14, 1886, in a suit depending in said court between the United States and John McArthur, John Alston, Carlile Mason, and others, a judgment was rendered against the said John McArthur, John Alston, Carlile Mason, and others, and the said John Alston and Carlile Mason having
173 obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said John Alston and Carlile Mason shall prosecute their writ of error to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN ALSTON. [SEAL.]
HORATIO J. COLVIN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
W. Q. GRESHAM.
Circ't Judge.

Endorsed: Filed Oct. 13, 1886. Wm. H. Bradley, clerk.

174 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The United States of America is the plaintiff and John McArthur, Carlile Mason, John Alston, *et al.* are the defendants as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand — affixed the seal of said court, at my office, in Chicago, in said district, this fourteenth day of October, 1886.

WM. H. BRADLEY, *Clerk.*

175 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between The United States of America, plaintiff, and Carlile Mason, John Alston, and others, *are* defendants, in an action of debt, a manifest error hath happened, to the great damage of the said Carlile Mason and John Alston, defendants, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirteenth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Carlile Mason and John Alston, plaintiffs in error, *vs.* The United States of America, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

176 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The United States of America is plaintiff and John Alston, Carlile Mason, with others, are defendants, to show cause, if any there be, why the judgment men-

tioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, circuit judge, this 13th day of August, in the year of our Lord one thousand eight hundred and eighty-six.

WALTER Q. GRESHAM.

177 [Endorsed:] Supreme Court of the United States. —— —— *vs.* —— ——. Citation to October term, A. D. 18—.

Due service of this citation acknowledged this 14th day of October, 1886.

WM. G. EWING,
U. S. Attorney.

Endorsed on cover: N. Illinois C. C. U. S. No. 492. Carlile Mason and John Alston, plaintiffs in error, *vs.* The United States. Filed October 18, 1886.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

CARLISLE MASON ET AL.

vs.

THE UNITED STATES.

Writ of Error to the Circuit Court for the Northern District of Illinois.

MOTION TO AMEND THE WRIT OF ERROR, CITATION, AND BOND.

W. C. GOUDY,
ATTORNEY FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 214.

CARLILE MASON AND JOHN ALSTON,
Plaintiffs in Error,
vs.
THE UNITED STATES.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The undersigned, John McArthur, James Steele, Thomas S. Dobbins and Solomon McKichan, against whom, with Carlile Mason and John Alston, a judgment was rendered by the Circuit court of the United States on the fourteenth day of July, 1886, in favor of the United States of America, for three hundred thousand dollars debt, to be satisfied upon making the sum of $108,648.50 damages, together with costs and from which judgment a writ of error was prosecuted and is now pending in the Supreme court of the United States;

Do hereby enter our appearance in the Supreme court of the United States and consent to an amendment of the writ of error in any way which said court may see proper to allow, and also, if permitted by the court, join in the assignments or error, and, in case that shall not be

allowed, consent to a judgment of severance so that the said writ of error may be prosecuted by our co-defendants in said judgment, Carlile Mason and John Alston, and to any further order that may be necessary to enable the plaintiffs in error to prosecute said suit in said Supreme court.

JOHN MCARTHUR,
JAMES STEELE,
SOLOMON MCKICHAN,
THOMAS S. DOBBINS,
By his attorney,
WILLIAM C. GOUDY.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1889.

Carlisle Mason and John Alston, Plaintiffs in Error, *vs.* The United States. } No. 214.

In error to the Circuit court of the United States for the Northern District of Illinois.

Wm. C. Goudy, being sworn, says that he represented John McArthur, Carlisle Mason, John Alston, James Steele and Thomas S. Dobins, in the Circuit court of the United States for the Northern District of Illinois in this suit commenced by the United States against them and others, from about the first of January, 1878, in connection with John W. Ela until some time in the year 1885, when this deponent assumed the sole defense for said persons, the said John W. Ela becoming unable to attend to the business at that time because of sickness

That the deponent represented all of said persons on the trial in 1886, which resulted in the judgment of July 14, 1886, and was authorized to take all such steps in their behalf, as was necessary to bring the case to the Supreme court of the United States for review. That he procured the writ of error, which now appears in the record, from the clerk of the Circuit court of the United States for the Northern district of Illinois, supposing that the cause would be brought to this court for review of the alleged errors in the court below, the same as if said writ of error had named all of the defendants in said judgment, and that if the same should be reversed, that it would be reversed as to all, that being the practice in the State of Illinois; and that his attention was not called to the practice prevailing in the Supreme court until the cause came on for argument. Deponent further says that he had authority to have used the names of John McArthur, John Alston, Carlisle Mason, James Steele and Thomas S. Dobins in the prosecution of a writ of error, and that as he understands it, he had the right to use the name of Solomon McKichan in connection with the other defendants, according to the rules of law, but the deponent further says that he now perceives that said writ of error is defective in describing the suit as one between the United States of America, plaintiff, and Carlisle Mason, John Alston and others, defendants, when the writ should have named all of the defendants in the judgment for the purpose of correctly describing the suit, and that the same error exists in the citation, and the suit should have been docketed in this court in the names of all of the defendants in said judgment.

The deponent further says that he has procured the signatures of John McArthur, James Steele and Solomon

McKichan to a paper attached hereto entering their appearance and consent to such proceedings as may be necessary to enable the court to determine the errors assigned, and that he could have procured the personal signature of Thomas S. Dobins, the remaining defendant, except for the reason of his absence from Chicago, his place of residence, in Colorado at some point which deponent has been unable to ascertain in time to procure the signature during the present term, and for that reason he has exercised the authority which he has as attorney by signing the name of said Thomas S. Dobins to said paper. And deponent further says that he has been fully authorized to sign all the said names except that of Solomon McKichan, as attorney, without obtaining their consent at the present time, but that he preferred having them append their signatures in person to such consent and has done so as far as possible at the present time.

WILLIAM C. GOUDY.

Subscribed and sworn before me this 1st day of May, 1890.

J. L. MCKITTRICK,
Notary Public.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

CARLISLE MASON ET AL.

vs.

THE UNITED STATES.

Writ of Error to the Circuit Court for the Northern District of Illinois.

MOTION TO AMEND THE WRIT OF ERROR, CITATION, AND BOND.

And now comes Carlisle Mason, John Alston, John McArthur, James Steele, Thomas S. Dobbins, and Solomon McKichan, who, jointly, and severally, move for leave to amend the writ of error by inserting therein their names, they being all of the defendants in the judgment rendered by the Circuit court for the Northern district of Illinois, on the 16th day of July, 1886, and also by a similar amendment to the citation and bond;

And that the said John McArthur may be allowed to join in the errors assigned by the said Carlisle Mason, and John Alston;

Or, in case said application cannot be allowed, that an order and judgment of severance be entered so that the

judgment rendered in the court below against said John McArthur, James Steele, Thomas S. Dobbins, and Solomon McKichan may be allowed to stand, and the said Carlisle Mason and John Alston permitted to prosecute the writ of error and their assignments made upon the record herein.

Or, that such other and further order may be entered as may be consistent with the rules and practice of this court in order to permit a review of the rulings and decisions of the court below.

W. C. GOUDY,

Attorney for the above named persons.

Points and Authorities.

I.

THE PROCEEDINGS FOR THE AMENDMENT OF THE WRIT OF ERROR MUST BE HAD IN THIS COURT.

The writ of error issues from the Supreme court to the Circuit court, commanding that court to send up a transcript of the record. It is a new suit commenced in this court and not in the Circuit court.

In *Mussina* v. *Cavazos*, 6 Wall., 357, it is said:

"The writ of error is the writ of this court and not of the Circuit court whose clerk may actually issue it. The earlier practice was that it could only issue from the office of the clerk of the Supreme court, and in the case of *West* v. *Barnes*, 2 Dallas, 401, at the August term, 1791, it was so decided. This decision led to the enactment of the ninth section of the act of 1792, by which it was provided that the clerk of the Supreme court, assisted by any two justices of said court, should prescribe the form of a writ of error, copies of which should be forwarded to the clerks of the Circuit courts, and that such writs might be issued by these clerks under the seals of their respective courts.

"The form of the writ provided under this act has been in use ever since. It runs in the name of the president and bears the attest of the chief justice of this court. It is in form and in fact the process of this court directed to the justices of the Circuit courts, commanding them to return with said writ into this court a transcript of the record of the case mentioned in the writ."

The provisions of section 9 of the act of 1792, have been substantially continued and are in force.

"SEC. 1,004. Writs of error returnable to the Supreme court may be issued as well by the clerks of the Circuit courts, under the seals thereof, as by the clerk of the Supreme court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several Circuit courts by the clerk of the Supreme court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six."

It is by virtue of this section that writs of error are obtained from the clerks of the Circuit courts, but the writ is still the writ of the Supreme court and no proceedings could be taken for its amendment in the Circuit court.

SEC. 1,005 expressly authorizes such amendments to be allowed by the Supreme court.

II.

A WRIT OF ERROR MAY BE AMENDED.

Without any statutory provision amendments to writs of error have been frequently allowed. But whatever may be the rule in the absence of legislation, the practice is now fixed by section 1,005, which reads as follows:

"SEC. 1,005. The Supreme court may, at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the *teste* of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of commencement of the term next

ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, The defect has not prejudiced, and the amendment will not injure, the defendant in error."

In this case the difficulty in the writ is the failure to use the names of all of the defendants against whom a judgment was rendered. The names of these parties can be ascertained from the record itself. It follows that the difficulty can be remedied by reference to the accompanying record, and comes within the provisions of section 1,005.

That section expressly authorizes an amendment when the statement of the parties in the writ is defective, and also extends to all other particulars of form if the difficulty can be remedied by reference to the record. According to the authorities the defendants in a judgment who desire to carry the case to a higher court for review have the right to use the names of other co-defendants. An omission to use them is one of form only. The parties whose names are thus used may refuse to join in the prosecution of the writ; if so, the parties who do carry on the case must do so at their own expense. Where the practice prevails of severance, in order to permit the prosecution of a writ of error, the parties declining to proceed must submit to such a judgment.

In this case the record discloses the names of six persons against whom the judgment was rendered.

The writ of error and bond shows that two of these six persons applied for the writ. The only irregularity was in omitting to insert the names of all of the six par-

ties in the writ of error. This defect can now be remedied by reference to the record. When the amendment is allowed, then the case would stand in the same condition precisely as if the writ had contained all the names of the entire six. It is unnecessary to call in the four who did not apply for the writ, because they have entered an appearance which waives the necessity for a summons. The case then stands before the court as if the names of all six had been originally inserted in the writ, and they had been summoned to assign errors or submit to a judgment of severance.

Amendments have been allowed to writs of error in a number of cases, showing extreme liberality in construing section 1,005. The currents of decisions in all courts has been for many years to permit any amendment which will bring the merits of the case before the court for decision. Such a course is in furtherance of justice, and cannot do injury to any one.

No stronger instance of this disposition can be produced than that exhibited recently in this court by the decision in *Wight* v. *Nicholson*, decided March 3, 1890, and reported in the 10th Supreme Court Reporter, at page 487.

Under the authority of section 1,005 of the Revised Statutes, a writ of error may be amended by inserting the proper return day.

Atherton v. *Fowler*, 91 U. S., 143.
Tex. & Pac. Ry. v. *Kirk*, 111 U. S., 486.
Semmes v. *U. S.*, 1 Otto, 24.
Natl. Bank v. *Bank of Commerce*, 99 U. S., 608.
Mossman v. *Higginson*, 4 Dal., 13.
Hampton v. *Rouse*, 15 Wall., 684.

Where the appeal is taken in the name of a firm, instead of the various parties, it may be amended by inserting their names.

Estis v. *Trabue*, 128 U. S., 229.
Moore v. *Simonds*, 100 U. S., 145.

Where a necessary party to a writ of error is omitted, the court may, in its discretion, permit an amendment.

Pearson v. *Yewdall*, 95 U. S., 294.

Any irregularity in a matter of form may be amended.

Smith v. *Jackson*, 1 Paine, 489.

III.

THE MISTAKE IN THE WRIT OF ERROR IS THE FAILURE TO NAME THE SIX DEFENDANTS, AGAINST WHOM JUDGMENT WAS RENDERED, AS PLAINTIFFS IN ERROR.

The record shows that the judgment was rendered against John McArthur, Carlisle Mason, John Alston, James Steele, Thomas S. Dobbins and Solomon McKichan.

The writ of error mentions two of them, Carlisle Mason and John Alston, as plaintiffs in error. The fault was in omitting to name all six as such plaintiffs in error. If that had been done, and error had been assigned by two only, it would have then become necessary, according to the authorities of this court, to issue a summons against the remaining four to require them to assign error or to submit to a judgment of severance, so as to allow the two who had assigned error to proceed with the case.

The four defendants below, who were not mentioned in the writ as plaintiffs in error, have now entered an

appearance, so that it is not necessary to have a summons against them. They consent to such order as the court may deem necessary to enable Carlisle Mason and John Alston to prosecute the writ.

They are willing to assign errors or join in the errors assigned if the practice of the court allows such a course to be pursued; if not, they consent to a judgment of severance, so that Mason and Alston may proceed with their assignment, and be heard in argument by the court.

A statute of Illinois allows the removal of a case to the Supreme court, by appeal or writ of error, where a judgment is against two or more persons, by either one of such persons, and for that purpose the plaintiff in error or appellant is allowed to use the name of all the other co-parties, if necessary to permit the prosecution of such an appeal or writ of error. In all such cases the proceedings are to be the same as if all the parties had joined in the appeal or writ of error.

Section 70 of the practice act, as amended in 1872, reads as follows:

"In all cases where a judgment or decree shall be rendered in any Circuit court, or in the Superior court of Cook county, or in any city court, in any case whatever, either in law or in chancery, against two or more persons, either one of said persons shall be permitted to remove such suit to the Appellate court, by appeal or writ of error, and for that purpose shall be permitted to use the names of all of said persons, if necessary, but no costs shall be taxed against any person who shall not join in said appeal or writ of error. All such cases shall be determined in said Appellate courts, as other suits are, and in the same manner as if all the parties had joined in said appeal or writ of error."

This section has been understood in Illinois to dispense with the practice of a summons and severance. It has been customary for any one or more of the defendants in a judgment to take the case to the Supreme court without the use of any other names as appellants or plaintiffs in error. Sometimes such cases have been docketed in in the name of A B impleaded with C D, plaintiff in error, without other use of the names of the co-defendants. When a joint judgment has been reversed, it has been reversed as to all the parties whether prosecuting a writ of error or not.

It was this practice under the Illinois statute which was adopted in obtaining the present writ of error without an examination by counsel of the decisions of this court.

The act of Congress, providing that the practice in the Federal courts should be the same as far as practicable as that in the State courts, does not in terms apply to practice in the Supreme court, and it may be that this court will not regard the different provisions of State statutes on this subject.

Without legislation regulating the practice the authorities are to the effect that when a joint judgment is rendered against two or more persons, that the names of all of them must be used as plaintiffs in error whether they all unite in procuring such writ or not.

When the transcript is filed it appears that some of the persons named as plaintiffs in error have made no assignment, then for the first time it will appear that less than the whole number have brought the case into this court. It would seem to be the practice at that point of the proceedings to require the plaintiffs who have assigned error to sue out a summons against those who have omitted to

appearance, so that it is not necessary to have a summons against them. They consent to such order as the court may deem necessary to enable Carlisle Mason and John Alston to prosecute the writ.

They are willing to assign errors or join in the errors assigned if the practice of the court allows such a course to be pursued; if not, they consent to a judgment of severance, so that Mason and Alston may proceed with their assignment, and be heard in argument by the court.

A statute of Illinois allows the removal of a case to the Supreme court, by appeal or writ of error, where a judgment is against two or more persons, by either one of such persons, and for that purpose the plaintiff in error or appellant is allowed to use the name of all the other co-parties, if necessary to permit the prosecution of such an appeal or writ of error. In all such cases the proceedings are to be the same as if all the parties had joined in the appeal or writ of error.

Section 70 of the practice act, as amended in 1872, reads as follows:

"In all cases where a judgment or decree shall be rendered in any Circuit court, or in the Superior court of Cook county, or in any city court, in any case whatever, either in law or in chancery, against two or more persons, either one of said persons shall be permitted to remove such suit to the Appellate court, by appeal or writ of error, and for that purpose shall be permitted to use the names of all of said persons, if necessary, but no costs shall be taxed against any person who shall not join in said appeal or writ of error. All such cases shall be determined in said Appellate courts, as other suits are, and in the same manner as if all the parties had joined in said appeal or writ of error."

This section has been understood in Illinois to dispense with the practice of a summons and severance. It has been customary for any one or more of the defendants in a judgment to take the case to the Supreme court without the use of any other names as appellants or plaintiffs in error. Sometimes such cases have been docketed in in the name of A B impleaded with C D, plaintiff in error, without other use of the names of the co-defendants. When a joint judgment has been reversed, it has been reversed as to all the parties whether prosecuting a writ of error or not.

It was this practice under the Illinois statute which was adopted in obtaining the present writ of error without an examination by counsel of the decisions of this court.

The act of Congress, providing that the practice in the Federal courts should be the same as far as practicable as that in the State courts, does not in terms apply to practice in the Supreme court, and it may be that this court will not regard the different provisions of State statutes on this subject.

Without legislation regulating the practice the authorities are to the effect that when a joint judgment is rendered against two or more persons, that the names of all of them must be used as plaintiffs in error whether they all unite in procuring such writ or not.

When the transcript is filed it appears that some of the persons named as plaintiffs in error have made no assignment, then for the first time it will appear that less than the whole number have brought the case into this court. It would seem to be the practice at that point of the proceedings to require the plaintiffs who have assigned error to sue out a summons against those who have omitted to

do so, requiring them to make assignment, or in case of failure so to do, to submit to a judgment of severance, and thus allow the parties desiring to do so to proceed in the case.

The last decision on this subject is that of *Estis* v. *Trabue*, 128 U. S., 225. In that case the court say:

"It is well settled that all the parties against whom a judgment of this kind is entered must join in the writ of error if any one of them takes out such a writ; or else there must be a proper summons and severance in order to allow of the prosecution of the writ by any less than the whole number of defendants against whom the judgment is entered."

Authorities are cited in support of this rule.

One of the cases cited is that of *Masterson* v. *Herndon*, 10 Wall., 416, in which the opinion was delivered by Mr. Justice MILLER, and is as follows:

"It is the established doctrine of this court, that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.

"In the case of *Williams* v. *Bank of the United States*, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and

severance; and in the case of *Todd* v. *Daniel*, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the Circuit court for an appeal, that Maverick refused to prosecute the appeal with him.

"We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his

refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with the less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this."

I have examined the authorities upon this question in several works on practice, and think it important to furnish them to the court. They are as follows:

"All persons interested in the judgment sought to be reviewed must be made parties to the writ of error, and in the order in which they stand in the record below. When, therefore, one of two or more defendants against whom a decree has been rendered, brings a writ of error to reverse it, it is necessary for him to join his co-defendants as plaintiffs in error; and upon the trial they may unite with him and assign error against the decree, or they may sever and be heard in defense of the decree.

Carrey v. *Giles*, 10 Geo., 1. And if such plaintiff in error has failed to make his co-defendants parties plaintiff to the writ of error, they may be added by motion without delay or costs, with the same privilege of assigning error or severing. (*Ib.*) Where on an appeal judgment is rendered against an appellant and his sureties on an appeal, they should all be joined in a writ of error, or the writ will be dismissed. *Dill* v. *Jones*, 2 Kelly, 79; *Morris* v. *Wiley*, 2 Kelly, 287; *Long* v. *Strickland*, 2 Kelly, 348; *Carey* v. *Rice*, 2 Kelly, 408; *Coffee* v. *Neuson*, 2 Kelly, 439; and see note (a), *post*, p. 1163."

2 Tidd's Prac., 1134.

"On a judgment against *several* parties, the writ of error must be brought in all their names (6 Co., 25; Cro. Eliz., 648, 9 S. C., Yelv., 4; Cro. Eliz., 892, S. C.; Carth., 7, 8; 3 Mod., 134 S. C.; 1 Ld. Raym., 71, 151; 5 Mod., 16, 69; Carth., 367; Comb., 354; Holt, 54, S. C., 1 Ld. Raym., 244; Carth., 404; Comb., 441; 1 Salk., 319; 5 Mod., 338, S. C.; 1 Ld. Raym., 328, 2 Ld. Raym., 870; 1 Salk., 312, 13, S .C.; 6 Mod., 40; 1 Str., 234; 2 Ld. Raym., 10, 43; 1 Str., 606; 8 Mod., 305, 316, S. C.; 2 Ld. Raym., 1532; Cas. *temp.*, Hardw., 135, 6; Barnes, 202; 1 Wils., 88; 3 Burr., 1792; 2 Durnf. & East., 737), provided they are all living, and aggrieved by the judgment; for otherwise this inconvenience would e[illegible] that every defendant might bring a writ of error by himself, and by that means delay the plaintiff f[illegible]m his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener. (Carth., 8; and see 3 Burr., 1789.) And if the writ of error be brought by one or more of the defendants only, it may be quashed; or the courts will give the plaintiff leave to take out execution.

(Barnes, 202.) But when judgment is given against several parties, and one of them die, the writ of error must be brought by the survivors. (Palm., 151.; 1 Str., 234.) And in *trespass* against three, if there be judgment by default against two of them, and the third plead to issue, and it be found for him, the two only may bring a writ of error; for the party in whose favor the judgment was given, cannot say that it was to his prejudice. (1 Lev., 210. Hob., 70. 1 Str., 683. 2 Str., 892, 1110. Cowp., 425. 2 Bac. Rep., 1067; but see Sty. Rep., 190. 3 Salk., 146, *semb. contra.*) So, if a writ of error be brought in the names of several parties, and any one or more of them refuse to appear and assign errors, they must be *summoned* and *severed;* after which the writ of error may be proceeded in by the rest alone. (Yelv., 4. Cro. Eliz., 892, S. C. Cro. Jac. 117. Carth., 7, 8. 3 Mod., 134, S. C. 6 Mod., 40. 1 Str., 234. Cas. *temp.* Hardw., 135, 6.) And where a writ of error was brought in the names of two executors, and one would not join in assigning errors, the court of King's Bench gave the other time to assign them, till there could be summons and severance. (2 Str., 783.) On a writ of error brought against two executors, one only appeared, and sued out a *scire facias quare executionem non*, upon which the judgment was affirmed for both executors; and upon a second writ of error, the court held, that a *scire facias quare executionem non*, is only to bring in the plaintiff in error to assign his errors; and as he came in upon it, and assigned his errors, he waived any objection, and admitted the one executor to be sufficient to call upon him to assign them, and the court are not to presume that the other executor is alive; and though a writ of error by one alone, upon a judgment against two, be not good,

yet that is on account of the inconvenience that would arise from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason does not hold in this case, where the executors are defendants in error, and not plaintiffs. (3 Bur., 1789.)"

2 Tidd's Prac., p. 1135.

"A writ of error was not amendable at common law. 1 Salk., 49, 1 L. Raym., 564–71. But now, by 5 G. 1. c. 13, all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where such writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the court allowed the writ to be amended by striking out his name. 2 Str., 892, Fitz., 201, 1 Barnard, 405, 421. Cowp., 425, 2 W. Bl., 1067. So, a mistake in the name of one of the parties has been amended; 2 Smith, 259; in another case the writ was amended by adding parties; 2 Str., 682, but see 1 Str., 606. 2 L. Raym., 1403. 1 L. Raym, 71. Carth., 8. 2 Str., 1110. 8 T. R. 302; and in another, by altering even the description of the form of action. 5 Taunt., 82. But when the writ is returnable before judgment is given, this is a fault which cannot be amended. 2 St., 807, 2 L. Raym., 1531, 1 Barnard, 62, 65, 2 Str., 834, 891, 2 L. Raym., 1179, and see *ante*, p. 231.

The amendment in this case is now allowed, as a matter of course, without costs; 2 Str., 902, 2 L. Raym., 1587, Fitz., 268; but if the rule be also to amend the assignment of errors, it is upon payment of costs. Fitz., 268. According to the statute, the writ is to be amended by

the court in which it is returnable; yet this seems to be only in cases where the original record, and not a transcript merely, is removed into such court, and therefore upon a writ of error from King's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the court of King's Bench where the original record lay. 2 Str., 837, 869. Upon amending a writ of error new bail must be put in to the amended writ, in the court below. 2 W. Bl., 1067."

Archbold's Prac. pp. 236, 237.

"Where a judgment is given against several, any of them may bring a writ of error, but it must be in the names of all, otherwise the court will quash it. M.S. E., 1814; 2 T. R., 738; 3 Bur., 1789; 1 Str., 233, 606; 1 Wils., 88; 1 L. Raym., 405, 328, 71; Ro. Abr., 747; Dy., 89; 3 Leon., 176; Cro. El., 65; Style, 406; Carth., 7, 3; Mod., 134; Yelv., 209; 2 L. Raym., 870, 1,403, 1,532; Hardw., 135; Palm., 151; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from having the benefit of his judgment, though it should be affirmed once or oftener. And so strict are the courts in this respect, that although one of the parties may have died, yet he must be named in the writ, and his death stated, though the writ may be brought by the survivors alone. 1 Str., 233. The death in such a case may be alleged in the writ thus: 'Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before you and your companions, our justices of the bench, by our writ, between J. N.,' (for whom the judgment was given) 'and J. S., late of ——, and G. H.,' (those against whom it was given), 'which said G. H. is since

deceased, etc., to the great damage of the said J. S., who hath survived the said G. H.,' etc. 2 Saund., 101 *e*. If, after error brought by one of several plaintiffs or defendants, in the names of all, the others refuse to come in and join with him in the assignment of errors, they must be summoned and severed; after which he may proceed in the writ of error alone; Yelv., 3, 4; Cro. El., 891; Cro. Jac., 94, and see 6 Mod., 40; 1 Lev., 146; and the court will give him time to assign errors, until the others can be summoned and severed. 2 Str., 783. *See a form of the writ of summons*, Thes. Brev., 301. But, if, in trespass against three, there be judgment against two of them by default, and the third justifies, and it is found for him, the two against whom judgment was given can alone join in a writ of error; for the other cannot say that the judgment was to his prejudice; 1 Lev., 210; Hob., 70; but see Style, 190; and the same, if the two had been found guilty by verdict, and the other acquitted. Cowp., 425. The writ, however, in these cases, should describe the record as it really is, including all the parties to it, alleging the error to be to the 'great damage' of those who bring the writ of error. 2 Str., 682. Also, where an action was brought against two, one of whom was outlawed, and judgment passed against the other, and the latter thereupon brought a writ of error in his own name; an objection being taken that the writ should have been brought in the names of both, the court overruled it, saying that the writ, as to one of the defendants, was determined by the outlawry. 1 L. Raym., 691, and see Palm., 151. And in all cases, where a writ of error is brought by some of several defendants, notwithstanding it may be liable to be quashed on this account, it still has the effect of removing the record, and is a supersedeas of execution as to all the defendants. 2 T. R., 737.

"Where all the parties should have joined, and have not, if the judgment in error proceeded without quashing the writ, and the judgment be affirmed, he can sue out execution against those only who were parties to the writ. 2 T. R., 737.

"And it must be observed that if a party or his attorney enter into any agreement not to bring a writ of error, he is afterwards precluded from bringing it, though there be manifest error in the record; 1 H. Bl., 21.; 2 T. R., 183; or if he bring it, the court on motion will order him to *non-pros* it: 1 T. R., 388. And the court are so strict in this respect, that where the defendant's attorney agreed not to bring a writ of error in *the action*, they held that the defendant's executors were thereby precluded from bringing error on a judgment in a *scire facias* which was brought against them to revive the judgment upon the death of the defendant; 1 T. R., 388; *see post*, p. 244.

"As to defendants in error, the general rule is, that the writ of error must be brought against him only who was party or privy to the first judgment, or his heirs, executors or administrators: 9 H. 6., 46. Bro. Error, 9 Ro. Abr., 749, and see 1 Ro. Rep., 302; and as to the number of defendants, the rule is the same as to that relating to plaintiffs. However, where one only of two defendants in error appeared, and sued out a *sci. fa. quare executionem non*, and the plaintiff thereupon assigned errors; this was deemed a waiver of the objection that the other defendant should have been joined: 3 Bur., 1789.

"You may sue out and prosecute a writ of error, by a different attorney from that employed by you in the original action, without obtaining a judge's order to change your attorney: 7 T. R., 337. See further upon the subject of parties to a *writ of error*, Bacon's Abr., Error B. 2 Saund. 101 *c*, *f*.

"*In what court to be brought.* The writ of error is brought, either in the same court in which the judgment was given, or to which the record has before been removed by a former writ of error, or in another and a superior court: 1 Archbold's Prac. pp. 232, 233, 234.

"And all who were affected by the judgment either as plaintiffs or defendants, or their personal representatives, should join in the proceedings in error as parties thereto, as they were joined in the judgment, and interested for or against its reversion. A party co-defendant in the judgment who refuses to join in the proceedings in error should be summoned and severed. *Bradshaw* v. *Callaghan*, 8 Johns, (N. Y.), 558; *Fenner* v. *Bettner*, 22 Wend., 621; *Smetters* v. *Rainey*, 14 Ohio St., 287. In Pennsylvania, on a judgment against several defendants, a writ of error cannot be maintained by one only. One defendant may, however, sue out a writ of error in the name of all, and if the others refuse to join in the prosecution, they may be summoned in error and severed, after which the person who sued out the writ may go on alone; *Foteral* v. *Floyd*, 6 S. & R., 315.

"When all the proper parties have not been joined as plaintiffs or defendants in error, the defendant may object to it, by doing so in time, by motion to dismiss or by a plea in abatement; for it is convenient and will tend to prevent multiplicity of suits and unnecessary labor, that all the parties interested in the judgment sought to be reversed should be brought before the court, so, that affirmance, reversal or modification of the judgment when made shall bind all the parties. But when such objection is sustained, the order may be modified on motion to amend the petition by making the proper parties, and service of process when necessary to make other parties.

(*Smethers* v. *Rainey*, 13 Ohio St., 568.) Proceeding in the case or pleading over waives the objection unless the court sees fit to interfere and order parties to be made. In analogy to the code in other proceedings, no objection will be sustained on account of the want of proper parties, unless made in the first instance, for it will then be deemed to have been waived. (*Cairnes* v. *Knight*, 17 Ohio St., 68; *Umsted* v. *Burkirk*, 17 *id.*, 114.)"

Powell on Appellate Proceedings, 273, 274.

From these authorities it would appear that even where there is an absence of legislation the courts have been liberal in allowing amendments to writs of error to the end that the questions involved may be reviewed; that new parties who should have joined in the writ of error have been allowed to have their names inserted as a proper amendment; that there is no occasion for a summons to bring parties in until it appears that there is a failure to assign error; and that when they do come into court, they may be allowed to assign error or to submit to a a judgment of severance.

It is to be observed that the reason given for the rule that all defendants in a joint judgment must be named as plaintiffs in error, is, to avoid the prosecution of separate writs of error by each, that the plaintiff in the judgment may not be harassed and put to costs and delay. In this case the reason does not exist. No writ of error except the one now before the court has been prosecuted. The time limited in the statute for procuring a writ of error has expired and therefore there can be no other suit seeking a review of the judgment below. It is an axiom that where the reason for the rule fails, the rule itself fails. No harm could come to the United States in this

case because of the omission to use the names of all the defendants in the judgment below as plaintiffs in error. Within this view of the case there is no necessity for any amendment or any proceeding not already taken. But if the court should be of a different opinion the appearance and consent of the defendants below who were not named as plaintiffs in error in the writ which was sued out will allow any course to be pursued which the court thinks proper according to the rules of practice.

IV.

THE FACT THAT THE TIME FOR PROSECUTING A WRIT OF ERROR HAS EXPIRED IS NOT A SUFFICIENT REASON WHY THE CAUSE SHOULD NOT PROCEED.

On the trial exceptions were taken by John McArthur, the principal in the bond, and Carlisle Mason and John Alston, two of the sureties. Thomas S. Dobbins and James Steele had plead jointly with Mason and Alston, but on the trial no exceptions were taken on their behalf. The other defendant, McKichan, did not plead, but made default. The only defendant who was placed in the position on the trial to have the questions of law reviewed other than Mason and Alston, was McArthur. Even if all six of the defendants had been nominal plaintiffs in error, three of them could not have been heard in this court, namely, Dobbins, Steele and McKichan. It may be that McArthur could not now be allowed to assign error because he was not joined in the writ with Mason and Alston, and two years have expired since the rendition of the judgment. If so, it follows that the use of the names of the four defendants who have used no name as plaintiff in error, would be one of mere form, and only neces-

sary to enable Mason and Alston to have the errors assigned by them considered and decided.

McArthur, if permitted by the court, will join in the assignment of errors of Mason and Alston. For the reason that no exceptions were taken by the others, it would be useless for them to attempt to do so. But if objection be made to McArthur's taking that course because of the two years having expired, then he consents, as well as the others, to a judgment of severance which would remove the objection to the prosecution of a suit by McArthur.

McKichan has never been represented by counsel. Prior to the trial I was the attorney for the other five defendants, but when the time for trial was reached Dobbins and Steele were unwilling to contribute to the expense of the trial, and for that reason it is stated in the record that only McArthur, Mason and Alston were represented by attorney and exceptions were taken on their behalf. For the purposes of this motion, I am authorized to represent all of these defendants.

W. C. Gandy
for Plffs in Error

Office Supreme Court U. S.
FILED
MAY 12 1890
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLISLE MASON AND JOHN Alston, plaintiffs in error,
vs.
THE UNITED STATES.

No. 214. Motion to amend the writ of error, citation, and bond.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION TO THE MOTION.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLISLE MASON AND JOHN Alston, plaintiffs in error, *vs.* THE UNITED STATES. } No. 214. Motion to amend the writ of error, citation, and bond.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION TO THE MOTION.

STATEMENT.

The judgment of the circuit court which it is sought by this proceeding in error to reverse was entered on the 14th of July, in the July term of the said court, 1886, and is to be found on page 54 of the record. It is as follows:

> It is thereupon considered and adjudged by the court that the said United States of America do have and recover against the said John McArthur, Carlisle

> Mason, John Alston, James Steele, Thomas S. Dobbins, and Solomon McKichan, impleaded, &c., the sum of three hundred thousand dollars, the debt in said declaration mentioned, together with the costs and charges of the said United States of America, by them about their suit in this behalf expended, and that the said United States of America have execution thereof, to be satisfied upon making the sum of one hundred and eight thousand six hundred and forty-eight dollars and fifty cents, their damages in this behalf, and their costs and charges aforesaid, taxed at the sum of ——— dollars and ——— cents.

Upon the same page, in the same entry, it is recited as follows:

> And thereupon, at the instance of the said John McArthur, Carlisle Mason, and John Alston, it is ordered by the court that they have thirty days from this day in which to present and file a bill of exceptions in this behalf.

On the 13th day of October, 1886, John Alston, Carlisle Mason, and Horatio J. Colvin gave bond in the sum of $500, conditioned that the said John Alston and Carlisle Mason should prosecute their writ of error to effect and answer all costs if they should fail to make their plea good. The recital in the bond is:

> Whereas lately, at a term of the circuit court commencing on the first Monday of July, 1886, and on July 14, 1886, in a suit depending in said court between the United States and John McArthur, John Alston, Carlisle Mason, and others, a judgment was rendered against the said John McArthur, John Alston, Carlisle Mason, and others, and *the said John Alston and Carlisle Mason having obtained a writ of*

error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the United States citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next, etc. (Rec., p. 72.)

The writ of error sued out is as follows (Rec., p. 73):

> Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between the United States of America, plaintiff, and Carlisle Mason, John Alston, and others, *are* defendants, in an action of debt, *a manifest error hath happened, to the great damage of the said Carlisle Mason and John Alston, defendants, as by their complaint appears*, and it being fit that the error if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, etc.

The citation was issued, and service of the citation acknowledged (Rec., p. 74) by the United States attorney; the transcript of record was filed, and the case docketed; a brief was filed on behalf of Carlisle Mason and John Alston, plaintiffs in error, in which the errors were assigned, and a brief on behalf of the United States was filed. The case was called regularly on the docket for hearing, and counsel for the plaintiff in error was proceeding to argue his assignments of error, when his attention was called to the fact that the error proceeding was prosecuted by only two out of the six defendants below, against whom a joint judgment had been rendered. The case was passed until counsel for plaintiff in error might

present certain affidavits, which it was suggested might cure the defect. On May 3d, 1890, this motion is filed:

> And now come Carlisle Mason, John Alston, John McArthur, James Steele, Thomas S. Dobbins, and Solomon McKichan, who, jointly and severally, move for leave to amend the writ of error by inserting therein their names, they being all of the defendants in the judgment rendered by the circuit court for the northern district of Illinois on the 16th day of July, 1886, and also by a similar amendment to the citation and bond;
>
> And that the said John McArthur may be allowed to join in the errors assigned by the said Carlisle Mason and John Alston.
>
> Or, in case said application can not be allowed, that an order and judgment of severance be entered so that the judgment in the court below against said John McArthur, James Steele, Thomas S. Dobbins, and Solomon McKichan may be allowed to stand and the said Carlisle Mason and John Alston permitted to prosecute the writ of error, and their assignments made upon the record herein.
>
> Or, that such other and further order may be entered as may be consistent with the rules and practice of this court, in order to permit a review of the rulings and decisions of the court below.

ARGUMENT.

The motion which has been made is in the alternative, and seeks either an amendment making the other defendants below plaintiffs in error here, or a judgment of severance by which the two present plaintiffs in error may prosecute this proceeding. The alternative remedies will be considered in their reverse order, and the first question dis-

cussed will be whether the plaintiffs in error are entitled here and now to a summons and judgment of severance.

I.

ANY SUMMONS OR JUDGMENT OF SEVERANCE SHOULD HAVE BEEN HAD IN THE CIRCUIT COURT.

It is submitted that the proceeding, in the nature of a summons and severance, should have been had in the circuit court, and that it is not proper to have it here.

In the case of *Todd* v. *Daniel* (16 Pet., 521), Mr. Justice Story describes the proper procedure as follows:

> The proper rule in cases of this sort, where there are various defendants, seems to be that all the defendants affected by a joint decree (although it may be otherwise where the defendants have separate and distinct interests, and the decree is several and does not jointly affect all) should be joined in the appeal; and if any of them refuse or decline upon notice and process (in the nature of a summons and severance in a writ of error) to be issued in the court below to become parties to the appeal, then that the other defendants should be at liberty to prosecute the appeal for themselves and upon their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed.

II.

SEVERANCE MUST BE HAD BEFORE THE RETURN DAY OF THE WRIT OF ERROR.

As the proceeding of summons and severance is taken from the common law practice, the rules which govern

that proceeding under the common law must prevail in this court. The rule at common law was that judgment of severance could not be given in a writ of error unless it was prayed before the defendant had pleaded *in nullo est erratum*. (Bacon's Abridg., 268; Cro. Ja., 117, *Blunt* v. *Snedstone*.)

While in the modern practice there is no issue joined formally by plea of the defendant in error, it is submitted that after the return day of the writ of error, issue is in fact joined on the writ, and that, therefore, a summons and judgment in severance cannot be had thereafter. In the present case not only has the writ been returned and the citation served, but a brief containing assignments of error, and a brief in opposition have been filed.

III.

SUMMONS AND SEVERANCE CANNOT BE HAD AFTER THE EXPIRATION OF TWO YEARS FROM THE RENDITION OF THE JUDGMENT.

Section 1008, R. S., provides:

> "No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in a Supreme Court on writ of error or appeal unless the writ of error is brought or the appeal is taken within two years after the entering of such judgment, decree, or order."

The proceeding in summons and severance is had to permit one or more of several parties to the litigation below, against whom a joint judgment has been rendered, to bring a writ of error without joining them all. In its nature, therefore, it is a condition precedent to the right of

any less than the whole number of the parties jointly interested, to bring a writ of error to the joint judgment, [redacted] When, therefore, the right of all the parties to bring a writ of error has lapsed, no severance can be had to permit part of them to pursue the right denied to all.

The severance here asked can not be entered *nunc pro tunc* because no such action was in fact taken by the court, or applied for by the parties at the time this writ of error was sued out. Nor can it be allowed on the ground that the failure to make such severance was due to the delay of the court. *Nunc pro tunc* entries are made only on two grounds—(1) that the order to be thus entered was in fact made, but not recorded by the clerk; (2) in the interest of justice where the failure to make the entry was due not to the party, but to the delay of the court.

IV.

THE DEFECT OF PARTIES PLAINTIFF IN ERROR CAN NOT BE CURED BY AMENDMENT.

A writ of error was not amendable at common law in any respect. (*Thompson* v. *Crocker*, 1 Salk., 49; *Walter* v. *Stokoe*, 1 Lord Raym., 71.)

The right to amend the writ of error here, therefore, must depend upon the statute. It was held by this court that the 32nd section of the judiciary act of 1789, now section 954 of the Revised Statutes, did not authorize the court to correct a defect in the statement of the parties in an admiralty appeal. (*The Protector*, 11th Wall., 82.)

Until the enactment of section 1005, R. S., which became the law on the 1st of June, 1872 (17 Stats., 196), it was not in the power of this court to supply the defect in the statement of the parties to an action in a writ of error even from the record. *A fortiori,* it was not in the power of the court to so amend the proceedings in error as to allow additional plaintiffs in error to be made parties to the suing out of the writ.

Section 1005, Revised Statutes, provides as follows:

> The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, where there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, The defect has not prejudiced, and the amendment will not injure, the defendant in error.

The question presented is whether the defect in the present writ of error sought to be remedied by amendment is a defect in the statement of the title of the action or parties thereto in the writ. There is no doubt that the statement of the parties to the action is defective in the writ of error under discussion, because the description of the defendants as "Carlisle Mason, John Alston, and others," is not sufficient. Before the enactment of section 1005, R. S., this defect could not have been remedied by amendment, and the writ must have been dismissed (*The Pro-*

tector, 11 Wall., 82; *Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet., 140; *Deneale et al* v. *Stump's Exrs.*, 8 Pet., 526).

Since the enactment of section 1005, however, it is conceded that the meaning of "and others" in the writ may be supplied by amendment, if the names of the others can be ascertained from the record. (*Moore* v. *Simonds*, 100 U. S., 145.) But the difficulty with the application here made to amend the writ is that it seeks to cure not a defect in the statement of the parties to the action below, but a defect in the parties who prosecute the writ of error. The defect in the writ of error is that all the defendants did not join.

This defect can not be cured by reference to the record, because it affirmatively appears from the writ itself (Rec. p. 73) and from the bond (Rec. p. 72,) that it was prosecuted and sued out by only two of the defendants below. To amend the writ, therefore, so as to show that it was sued out by all of the defendants below, would be to amend the writ in contradiction of the record, and not in accordance with what it shows. It seems manifest, therefore, that to grant such an amendment as is here requested would be in violation of, rather than in accordance with, section 1005, R. S.

The statute of 5 Geo. I, chap. 13, provided:

> That all writs of error wherein there shall be any variance from the original record, or other defect, may, and shall be, amended and made agreeable to such record by the respective courts where such writ or writs of error shall be returnable.

In *Elkins* v. *Payne*, 2 Ld. Raym., 1532, Elkins recovered a judgment in a *scire facias* against Payne, Field, and two others, as bail for one Crosby, and Payne and Field only brought a writ of error. Counsel for the plaintiffs in error moved that the writ of error might be amended by virtue of the statute of 5 George I, chap. 13, but the court held that the writ was not amendable, the other defendants not having joined in the writ of error; and the writ was quashed.

In the case of *Estis* v. *Trabue*, 128 U. S., 225, it has been expressly held by this court that a defect of parties plaintiffs in error was not amendable. In that case the judgment of the court below was against the claimants, Estis, Doan & Co., and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond. The writ of error was taken out in the name of Estis, Doan & Co., as plaintiffs in error, against Trabue, Davis & Co., as defendant in error, without setting out in the writ the names of the individuals who composed either of the firms. It was there held that as the record showed the individual members of the firms, the expression "& Co." in the writ of error was not a fatal defect, but that the names of the parties might be supplied from the record. But it was distinctly held that the non-joinder of the sureties in the prosecution of the writ of error, in the absence of a summons and severance was a defect which was not amendable under section 1005, R. S. Says this court, speaking by Mr. Justice Blatchford:

> But there is another difficulty in the present case which can not be reached by an amendment in or by this court under § 1005. The judgment is distinctly

one against "the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond," jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer*, 21 Wall. 235, 240.

It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. *Williams* v. *Bank of the United States*, 11 Wheat., 414; *Owings* v. *Kincannon*, 7 Pet., 399; *Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet., 140; *Todd* v. *Daniel*, 16 Pet., 521; *Smyth* v. *Strader*, 12 How., 327; *Davenport* v. *Fletcher*, 16 How., 142; *Mussina* v. *Cavazos*, 21 How., 280, 289; *Sheldon* v. *Clifton*, 23 How., 481, 484; *Masterson* v. *Herndon*, 10 Wall., 416; *Hampton* v. *Rouse*, 13 Wall., 187; *Simpson* v. *Greeley*, 20 Wall., 152; *Feibelman* v. *Packard*, 108 U. S., 14.

Where there is a substantial defect in a writ of error, which this court can not amend, it has no jurisdiction to try the case. *Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet., 140. It will then, of its own motion, dismiss the case without awaiting the action of a party. *Hilton* v. *Dickinson*, 108 U. S., 165, 168.

For these reasons the writ of error is dismissed.

V.

EVEN IF THE COURT COULD OTHERWISE ALLOW AN AMENDMENT THE FACT THAT THE STATUTE HAS RUN WOULD PREVENT ITS DOING SO IN THE PRESENT CASE.

The judgment in this case was entered on the 14th day of July, 1886. The time within which a writ of error could be brought expired on the 14th day of July, 1888. The defect in the writ of error was jurisdictional. The Supreme Court had no power to hear the case. (*Estis* v. *Trabue, supra; Heirs of Wilson* v. *Life and Fire Ins. Co.*, 12 Pet., 140.) Until a court has acquired jurisdiction to try a case, the running of the statute can not be stopped, and an amendment to supply a jurisdictional defect, therefore, must be in the nature of a new suit. As the amendment here asked for will supply a jurisdictional defect, it will be in effect a new writ of error, and that is barred by section 1008, above referred to.

VI.

THE MOTION TO AMEND SHOULD BE DENIED AND THE WRIT OF ERROR BE DISMISSED.

Respectfully submitted.

WM. H. TAFT,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

CARLISLE MASON AND JOHN ALSTON,
Plaintiffs in Error.

vs.

THE UNITED STATES,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

W. C. GOUDY,
FOR PLAINTIFFS IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

CARLISLE MASON AND JOHN ALSTON,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

On the twenty-sixth day of November, 1877, an action was commenced by the United States against John McArthur, Carlisle Mason, John Alston, James Steel, and others, in the Circuit court of the United States for the Northern district of Illinois. The summons commanded the marshal to summon the defendants to appear on the first day of the next term thereafter to be held on the third Monday of December, 1887, "To answer unto the United States of America in a plea of debt for three hundred thousand dollars, to their damage, as it is alleged, of one hundred thousand dollars."

December 7, 1877, a declaration was filed in which the plaintiff set forth a bond of the defendants to the United States in the penal sum of three hundred thousand dollars, dated January 10th, 1873, with the following condition:

"The condition of this obligation is such that whereas the above bounden John McArthur was appointed deputy postmaster at Chicago aforesaid on the 20th day of December, 1872, which said appointment was, on the 20th day of December, 1872, confirmed by the Senate of the United States;

"Now, if the said John McArthur shall well and truly execute the duties of said office according to law and the instructions of the Postmaster General, and faithfully, once in three months or oftener, if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands from postage collected, postage stamps and stamped envelopes sold, or money orders issued by him or from any other source connected with the postal service in the manner prescribed by the Postmaster General of the United States for the time being, and shall keep safely, without loaning, using, depositing in other banks, or exchanging for other funds than as allowed by law, all the public money collected by him or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment are received shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as

agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General, and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, mail keys, and other property and papers which he, as postmaster or as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department, then the above obligation shall be void; otherwise of force. And it is hereby expressly agreed and stipulated that in case the said John McArthur, postmaster, shall during his term of office execute a new bond with different sureties all the parties to the above obligation shall be held and bound for all charges against the said postmaster up to the end of the quarter during which such new bond shall be executed; and the acceptance of such new bond, whenever the same may be signified by the Postmaster General, shall date from the last day of such quarter." (Record, pages 3, 4.)

The declaration then alleges that the said John McArthur, having been appointed to the office of deputy postmaster of Chicago and confirmed, on the tenth day of January, 1873, entered upon the duties of the office.

The declaration assigns six breaches of the condition of the bond:

First. That on the seventeenth day of April, 1877, the said John McArthur had in his hands fifty-two thousand one hundred and twenty-three dollars and seventy-four cents, a balance which had come to his hands as deputy postmaster from postage collected and postage stamps and stamped envelopes sold by him, and from other

sources, as postmaster of the United States, and did not pay the same, as requested, in the manner prescribed by the Postmaster General of the United States.

Second. That on the twenty-seventh day of October, 1877, there was in the hands of said John McArthur eight thousand two hundred and forty-four dollars and seven cents, a balance of moneys which had come to his hands as such deputy postmaster from money orders issued by him and from other sources connected with the postal service and relating to postal money orders, and did not pay the same, although requested so to do, although the manner of paying the same had been prescribed by the Postmaster General.

Third. That before and on the 10th day of March, 1877, and while the said John McArthur was deputy postmaster, there was collected by him public money to the amount of fifty-two thousand one hundred and twenty-three dollars and seventy-four cents, and on the seventeenth day of April, 1877, the said McArthur received an order from the Postmaster General to pay over the same to Frank W. Palmer, then deputy postmaster at Chicago, and that said McArthur did not pay the same.

Fourth. That before and on the 10th day of March, 1877, and while the said McArthur was deputy postmaster, there was collected by him and in his possession public money to the amount of eight thousand two hundred and forty-four dollars and seven cents, and that on the twenty-seventh day of October, 1877, the said McArthur received an order from the Postmaster General to pay over the same to Frank W. Palmer, the deputy postmaster at Chicago, and that the said McArthur did not pay the same.

Fifth. That before and on the tenth day of March,

1877, the said McArthur had in his possession other public money, to wit: the sum of one hundred thousand dollars, and that he did not keep safely, without using, the public money last aforesaid until the same was ordered by the Postmaster General to be transferred or paid out, but, on the contrary, used or converted the same to and for his own purposes before the same was ordered by the Postmaster General to be transferred or paid out.

Sixth. That before and on the tenth day of March, 1877, and while the said McArthur was deputy postmaster, he as such, and as agent and depositary for the post-office department of the United States, received divers moneys, postage stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks and other property and papers to a large amount and of great value, to wit: to the amount and value of $100,000, for which he ought to have accounted with the United States, yet the said McArthur, though requested, would not account for the same in the manner directed by the Postmaster General.

The declaration concludes as follows:

"By reason of which premises the said writing obligatory has become forfeited, and thereby an action has accrued to the said plaintiffs to demand and have of the said defendants the sum of three hundred thousand dollars above demanded; yet the said defendants, though requested, have not paid to the said plaintiffs that sum of money or any part thereof, but refuse so to do, to the damage of the said plaintiffs of one hundred thousand dollars; and therefore they bring this suit," etc. (Rec., 3–7.)

John McArthur, the principal defendant, filed sixteen

pleas. Issue was joined on the first, sixth, seventh, eighth, tenth, twelfth, and fourth and fifth amended pleas. A demurrer was sustained to the others. (Rec., 48, 49.) The first, sixth, seventh and eighth and the fourth and fifth amended amounted to a traverse of the several breaches set forth in the declaration.

The tenth plea was as to the first and third breaches, except as to the sum of $34,824.04, in which McArthur alleged that the Cook County National Bank was a depository of the public moneys designated for that purpose by the secretary of the treasury; that the current monthly expenses of his office were large, to wit: the sum of $30,000 and upwards monthly, and in order to meet such expenses, with the sanction and approval of the post-office department and under the direction of the Postmaster General, he deposited in said bank postal funds; that before and on the nineteenth day of January, 1875, there was on deposit in said bank postal funds such as were required and necessary to meet the current expenses of his office, and while such money was on deposit in said depository the Cook County National Bank closed its doors and was put in liquidation by the proper officer, and Augustus H. Burley appointed receiver, and that the money above demanded (except the same aforesaid) has ever since been in the possession of the plaintiff and is now in the treasury of the United States. Wherefore he prayed judgment as against the action, except as to the said sum of $34,824.04. (Rec., 10.)

The twelfth plea was to the fifth breach, and alleged that there was due to the plaintiff $34,824.04, and that the plaintiff before and at the time of the commencement of the suit was indebted to the defendant in a larger sum, that is to say, in the sum of one hundred thousand dollars,

for work and labor, care, diligence, and attendance of the defendant, bestowed at the request of the plaintiff, and for materials furnished, and work and labor, etc.; and also for money deposited with the Cook County National Bank for the plaintiff at its request, and for other money due and owing from the plaintiff on account of sundry contracts and agreements before then made and entered into between the plaintiff of the one part and the defendant of the other part, and offered to set off and allow said sums so due against the amount due to the plaintiff. (Rec., 11, 12.)

To these two pleas the plaintiff filed replications *de injuria*. (Rec., 49.)

To the breaches in the declaration John Alston, Carlisle Mason and others of the sureties filed seven pleas, to which demurrers were sustained, except to the first and seventh. (Rec., 21–33, 48.) Replications were filed to the first and seventh. (Rec., 44, 50.)

The first plea denied the execution of the bond. (Rec., 21.)

The seventh was a plea of set-off, in which the defendants alleged that before and at the time of the commencement of the suit the plaintiff was indebted to McArthur in a larger sum of money than the damages sustained by reason of the breaches of the bond, that is to say, in the sum of fifty thousand dollars, postal funds received by him and deposited in the Cook County National Bank for the plaintiff; and in a like sum, postal funds received by him and paid to the Home National Bank for the plaintiff; and also in a like sum for labor and services done and performed, and materials provided by McArthur at the plaintiff's request in the erection and com-

pletion of the Sub-Treasury Building at San Francisco, and also in a like sum for labor and services done and performed and materials provided by McArthur at the plaintiff's request, in the erection and completion of the United States Court House and post-office at Lincoln, Nebraska; and further alleging that before the commencemert of the suit, to wit: On the 7th day of April, 1877, the plaintiff notified the said defendants that such sums of money would be credited to McArthur upon the damages so sustained by reason of the non-performance of the conditions of the bond. (Rec., 33.)

To this plea of set-off there was attached an account between the United States and John McArthur, claiming the balance due on the United States Sub-Treasury building at San Francisco of $3.997.76, and a balance due on the court-house at Lincoln, Nebraska, of $1,094 81, and of money deposited in the Cook County National Bank of $21,404.95, and of money deposited with the Home National Bank of $14,100. There was also attached to the plea a copy of a contract between McArthur and the supervising architect, dated December 10, 1875, for iron work to be furnished for the United States Sub-Treasury building at San Francisco, and a copy of another contract dated on the same day for the iron work on the court-house and post-office at Lincoln. (Rec., 24–43.)

On the thirty-first of May, 1880, the declaration was amended by leave of the court by striking out the words "eight thousand two hundred and forty-four dollars and seven cents" in the second and fourth assignments of breach in the declaration, and in lieu of those words inserting "twenty-three thousand five hundred and thirteen "dollars and fifty-one cents." (Rec., 50, 51.)

On the eleventh day of May, 1886, a jury was empan-

eled to try the issues, but before doing so the death of Charles Hopkinson was suggested, and a default taken against Solomon McKichan who had failed to plead. (Rec., 51.)

On the twelfth day of May, 1885, the jury rendered the following verdict:

"We, the jury, find the issues for the plaintiffs, and we find the plaintiffs' debt in the sum of three hundred thousand dollars, and assess the damages at one hundred and sixteen thousand five hundred and fifty-nine dollars and fourteen cents." (Rec., 52.)

John McArthur, Carlisle Mason and John Alston moved the court for a new trial. (Rec., 53.)

On the eighth day of July, 1886, the motion for a new trial came on to be heard, and the district attorney asked leave to amend the declaration so as to make the same to conclude to the damage of the plaintiff of three hundred thousand dollars. The court took the application for leave to amend and the motion for new trial after argument under advisement.

At the same time the district attorney remitted seven thousand nine hundred and ten dollars and sixty-four cents from the verdict. (Rec., 53.)

On the fourteenth day of July, 1886, the court allowed the motion of the district attorney and granted leave to change the *ad damnum* from one hundred thousand dollars to three hundred thousand dollars, and at the same time denied the motion for a new trial. (Rec., 54.)

Thereupon John McArthur, Carlisle Mason and John Alston moved the court to arrest the judgment, which was denied, and judgment was entered against all of the defendants for the three hundred thousand dollars, the debt

in the said declaration mentioned, together with the costs and charges of the said United States of America by them about their suit expended; and it was ordered that the United States have execution to be satisfied upon making the sum of one hundred eight thousand six hundred and forty-eight dollars and fifty cents their damages. (Rec., 54.)

On the thirteenth day of August, 1886, Carlisle Mason and John Alston sued out a writ of error and filed a bond, which was approved. (Rec., 73, 71.)

On the fourteenth day of October, 1886, a citation was served on the district attorney. (Rec., 73.)

Evidence and Exceptions.

The bill of exceptions shows that on the trial the plaintiffs read in evidence the bond described in the declaration.

The bill of exceptions then proceeds as follows:

"The plaintiffs next introduced in evidence a statement of the general postal account of the defendant, John McArthur, as postmaster, certified by the sixth auditor under the seal of his office, the certificate bearing date the 20th November, 1877, which statement comprised the period from the 16th February, 1873, to the 10th March, 1877, inclusive, and showed a balance of $52,123.74 due from McArthur. It also appeared from this statement that on the 14th of April, 1877, he was credited with $11,803.98 deposited in the U. S. Treasury, and there was other testimony to the effect that this sum was a part of the proceeds of certain bonds theretofore deposited by the Cook County National Bank to secure

the United States against loss of any funds which should be deposited in that bank by officers of the United States.

The plaintiffs then introduced in evidence a supplemental statement of the general postal account of the defendant McArthur, as postmaster, certified by the sixth auditor under the seal of his office, the certificate bearing date of the 1st May, 1880, which statement showed an additional charge of $19.34, making the total balance due on that account $52,143.08.

The plaintiffs then introduced in evidence a statement of the money-order account of the defendant McArthur, as postmaster, certified by the sixth auditor under the seal of his office, the certificate bearing date of the 20th November, 1877, which statement covered the period from the 22d February, 1873, to the 10th March, 1877, inclusive, and showed a balance of $8,244.07 due from McArthur on that account.

The plaintiffs next introduced in evidence a further statement of money-order account, which statement, with its annexed certificate, is as follows:

(A.)

OFFICE OF THE AUDITOR OF THE TREASURY FOR THE POST OFFICE DEPARTMENT.

I, F. B. Lilley, acting auditor of the Treasury for the Post Office Department, do hereby certify the annexed to be a true and correct transcript from the money-order account books of the Post Office Department of the account of John McArthur, late postmaster at Chicago, in the State of Illinois.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of

Washington, this tenth day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] F. B. LILLEY,
Acting Auditor.

John McArthur, late Postmaster at Chicago, Illinois, in money-order account with the United States.

Dr.			Cr.
Mar. 10, 1877.	To balance due United States per transcript furnished to U. S. Attorney.....		
	" money orders issued.....	$8,244.07	
	" fees on same...		
Feb. 10, '80.	To amount improperly claimed by John McArthur on account of money orders alleged to have been paid, which amount has been transferred to the credit of F. W. Palmer, P. M., Chicago, Ills....$14,865.91		
	By money orders paid.....		
	By money orders repaid.....		
	By deposit.....		
	Balance.....		$23,109.98
		$23,109.98	$23,109.98
	To balance due the United States..$23,109.98		

And the defendants, John McArthur, Carlisle Mason, and John Alston, severally objected to the receiving of the last-mentioned statement in evidence, because it appears to have been made after the commencement of this suit, and because the auditor appeared to have charged therein against the defendant McArthur the sum of $14,865.91 by transferring that amount from the account of his successor, as postmaster, Frank W. Palmer, and because this was done without any notice to the defendant McArthur and without any evidence being furnished of the liability of him or his bondsmen therefor, and because the sixth auditor could not change the account and thereby increase the liability of the defendant McArthur, or the other defendants, after the court had acquired jurisdiction of the subject-matter of this suit, so as to make the auditor's action evidence against them or any of them; but the court overruled the objections and allowed the last-mentioned statement of account to be, and the same accordingly was, read in evidence to the jury; to which decision of the court the defendants, McArthur, Alston, and Mason, severally excepted." (Record 58-60.)

The plaintiffs proved by Frank W. Palmer, the successor of McArthur, a presentation of a draft of the Post Office Department upon McArthur, dated April 17, 1877, for $52,129.94 and demand of payment by letter sent by mail June 27, 1877, by letters sent by mail in like manner to the several sureties; and also that said Palmer in like manner demanded payment of $23,109.98 on the thirteenth day of February, 1880, which letters were mailed on the same date.

The witness also testified that he had made a demand on the twenty-seventh day of June, 1877, in like manner by letters sent by mail for the balance of the money-order

funds, as at first claimed, but could not remember the amount so demanded. This was all of the evidence offered on behalf of the United States. (Rec., 60, 61.)

Before the case was submitted to the jury, John McArthur testified that the item of $14,865.91, appearing in the statement of the money-order account certified by the sixth auditor under date of the 10th of March, 1880, as transferred from the account of F. W. Palmer to the account of John McArthur, was not fixed by any agreement with the witness; that he never had any knowledge or information of any proposed change of the account in that respect; that he never had any hearing in regard to the same, and he disputed its correctness. The defendants, McArthur, Mason and Alston, then moved to exclude from the jury said certified statement; that the court overruled the motion and refused to exclude it, to which decision the said defendants severally excepted. (Rec., 68.)

The defendants, on their part, proved that the Cook County National Bank was a national banking association doing business at Chicago for some years before January, 1875, and had been designated as a depository for public money of the United States, according to the provisions of section 5,153 of the revised statutes.

The defendants then proved that the Cook County National Bank suspended business on the 18th of January, 1875, and Augustus H. Burley was appointed receiver by the comptroller of the currency, and took charge on the 8th of February, 1875, and that the business was wound up and a final report was made in January, 1884.

The defendants also proved that John McArthur, while deputy postmaster at Chicago, made deposits in the Cook

County National Bank, and two accounts were kept with him, one with "John McArthur, P. M.," and the other was "For money-order funds," and that there was due on those two accounts when the bank suspended, $39,-584.

The defendants also proved that when the bank was closed, it had on deposit in the United States treasury bonds of the face value of $150,000, which were subsequently sold by the treasury department for $174,582.02; that there was due from the bank to the United States, when it suspended, for moneys deposited by the collector of internal revenue, the sum of $155,305.47, and that there was due to the United States for moneys deposited by the postmaster as aforesaid, $39,584, a part of which was for general "postal funds" and a part "for money-order funds;" that the secretary of the treasury directed the payment of the sum of $155,305.47 from the proceeds of the bonds in full; and further directed a credit to be given to McArthur, as postmaster, of the residue of said proceeds, $19,239.05, leaving the sum of $20,-344.95 unpaid and due from the bank to the United States for public moneys deposited by McArthur as postmaster. It was further shown that of the sum of $19,-239.05 credited to McArthur, the sum of $11,803.98 was credited in the statement of the general postal account under date of April 14, 1875, and the sum of $7,435.07 was credited in the statement of the money-order account under date of the 17th of April, 1875, said statements being the same introduced in evidence by the district attorney, as aforesaid.

It further appeared in evidence and by admission that there had been paid over to the United States from the assets of the bank as dividends, in addition to the afore-

said credits, $998.61 on general postal account, December 21, 1876; $628 99 on money-order account on the same date; $886.42 on the general postal account, November, 20, 1883, and $545.72 on the money-order account on the same date; making a total of $3,039.74. (Rec., 61, 62.)

The defendant, McArthur, testified that he entered upon the duties of his office as postmaster February 15, 1873, and retired March 10, 1877; that when his term began there was no assistant treasurer at Chicago, but that one was appointed and opened his office some four or six months thereafter.

McArthur further testified that when he took his office he found his predecessor had been keeping an account of the post-office money in the Union National Bank, and the defendant did the same until the Cook County National Bank was designated as the depository, when upon receiving orders from the Postmaster General to do so, he changed the account from the Union National Bank to the Cook County National Bank, and continued to deposit in the latter bank until that bank suspended payment. (Rec., 62.)

McArthur further explained that "postal funds" were the receipts from sales of postage stamps, box rents and other receipts of the office, and a portion of that money was kept to pay the current expenses of the office; that the money-order funds were kept separate from the other funds of the office, and were kept subject to the control of the money-order division; that postal funds were deposited in the bank as "postmaster funds" and the money-order funds as "money-order business." (Rec., 63.)

McArthur further testified that it was necessary to keep on hand to meet the current expenses from fifty to sixty

thousand dollars, averaging that amount each month, and that he deposited the same as directed in a letter of the Postmaster General, with the assistant treasurer at Chicago, reserving a sufficient fund to meet the current expenses. (Rec., 63.) The letter referred to was read in evidence, and is as follows:

POST OFFICE DEPARTMENT, OFFICE OF THE THIRD ASSISTANT POSTMASTER GENERAL.

WASHINGTON, D. C., June 14, 1873.

John McArthur, P. M., Chicago, Ills.

SIR: An asst. treasurer of the U. S. having been located in Chicago, all postal funds must be deposited with that officer in future instead of the P. M., and you are requested to instruct postmasters accordingly should any tender their funds to you for deposit.

After paying the outstanding drafts, a list of which is herewith enclosed, you will make daily deposits of the proceeds of your office, reserving a sufficient sum to meet the current expenses. In case of failure to deposit on any given day you will promptly report to this office the cause thereof.

As no drafts will be drawn upon you hereafter, the rendition of the "monthly statement of receipts and disbursements" may be discontinued after the outstanding drafts shall have been accounted for.

Very respectfully.

WM. M. IRELAND,

Actg. Third Asst. P. M. G.

The defendants then offered to read in evidence a letter, dated April 25, 1877, to F. W. Palmer, P. M., of Chicago, in answer to the letter making demand, as testi-

fied by Palmer on the seventeenth of April, 1877, in which letter McArthur claimed that there was no such amount as demanded due from him to the United States; that he was instructed by the department to keep on hand for current expenses a sufficient amount of money for that purpose, which was deposited in the Cook County National Bank with the knowledge of the department, and that he was entitled to credit for items in the statements which had been furnished to the government and for damages on contracts and for an amount which had been paid to Special Agent Hawley of $675.

On the objection of the district attorney upon the ground that this letter was incompetent testimony, the court excluded it as evidence and the defendants excepted. (Rec., 63.)

For the purpose of sustaining the pleas of set-off, the defendants introduced in evidence the contracts between the United States and McArthur for iron work on the sub-treasury building at San Francisco, and the court-house and post-office at Lincoln, and introduced evidence tending to prove that a balance was due from the United States to McArthur on these contracts, and that he was entitled to damages by reason of delay on the part of the officers of the United States, and also evidence tending to prove the amount of such damage. (Rec., 64.) A letter of the sixth auditor was read in evidence stating that $2,819 had been allowed on these claims. (Rec., 64.)

Before offering in evidence the contracts, claims presented to the sixth auditor of the post-office department under sections 951 and 952 of the revised statutes, by letter, dated June 19, 1878, were introduced in evidence and also the decision of the auditor, as shown by letter dated June 27, 1878, refusing to allow such claims, it being

stated that the claims were presented and disallowed for the purpose of bringing them within the provisions of said sections and to enable the court to pass upon the same in this suit. (Rec., 64–68.)

These claims so refused were for moneys deposited in the Home National Bank, for moneys deposited in the Cook County National Bank and for work and material furnished on the sub-treasury building in San Francisco and also on the custom-house at Lincoln, Nebraska.

This was all of the testimony introduced by the defendants.

The court then excluded from the jury all of the testimony relating to the claims of McArthur against the United States, growing out of the two contracts for furnishing iron work for the public buildings at San Francisco and Lincoln, Nebraska, to which decision the defendants, McArthur, Mason and Alston severally excepted. (Rec., 68).

Charge to the Jury.

The entire charge to the jury is as follows:

"Charge to the Jury.

Gen. McArthur was not authorized to deposit post-office funds in the Cook County National Bank after the sub-treasury was established at Chicago.

In addition to that, he received a letter from the Third Assistant Postmaster General, as follows:

'An assistant treasurer of the United States having been located in Chicago, all postal funds must be deposited with that officer in the future instead of the P. M., and you are requested to instruct postmasters accordingly should any tender their funds to you for deposit.'

He speaks now of his direction to the postmaster here himself:

'After paying the outstanding drafts, a list of which is herewith enclosed, you will make daily deposits of the proceeds of your office, reserving a sufficient sum to meet the current expenses. In case—a failure to deposit on any day, you will promptly report to this office the cause thereof, as no drafts will be drawn upon you hereafter. The remission of a monthly statement of receipts and disbursements may be discontinued after the outstanding drafts shall have been accounted for.'

What evidence is there, then, before you that the balances shown in these certified statements are incorrect? You take them as correct, and on the strength of them you will return a verdict for the United States for the several balances shown, unless there is evidence here which overcomes the presumption which the law creates in their favor.

You will allow nothing in the way of credits on account of work done and material furnished by John McArthur in connection with the public buildings at San Francisco and Lincoln, Nebraska. You will allow nothing to him in addition to what is allowed in these statements in evidence on account of the funds which the United States received from the sale of bonds which had been deposited with the Cook County National Bank as a designated depository.

The plaintiff is entitled to interest upon these several balances from the time the money was demanded of John McArthur, and if the evidence fails to show a demand made, then interest from the commencement of this suit.

If you find for the plaintiffs, the form of your verdict will be: 'We, the jury, find for the plaintiffs and assess damages at $, and as to the other defendant, McKichan, we assess the damages at $.'

It is admitted, gentlemen, bear this in mind, that the defendants are entitled to credit for $3,039.74, which don't appear in any of these statements at all. That you will allow at such time as you think the money was paid on his account." (Rec., 69).

When the charge was delivered to the jury the defendants McArthur, Mason and Alston, severally excepted to so much of the charge as directed the jury to receive as correct the certified statements of the sixth auditor; and as to the certified statement showing a charge of $14,865.91 against John McArthur.

The same defendants also severally excepted to the following language of the court in the charge:

"You will allow nothing in the way of credits on account of work done and material furnished by John McArthur in connection with the public buildings at San Francisco and Lincoln, Nebraska. You will allow nothing to him in addition to what is allowed in the statements in evidence on account of the funds which the United States received from the sale of bonds which had been deposited with the Cook County National Bank as a designated depository." (Rec., 70.)

The bill of exceptions then shows the motion for new trial and the reasons in support thereof, and that after the same was made the district attorney, with the leave of the court, amended the declaration so as to make the same conclude to the damage of the United States the

sum of three hundred thousand dollars, and that he remitted the sum of $7,910.64 of the damages assessed. (Rec., 70, 71.)

The bill of exceptions then shows that on the 14th day of July, 1886, the court sustained the motion to amend the declaration and denied the motion for a new trial, and that the defendants McArthur, Mason and Alston excepted to the decision allowing the amendment of the declaration and also to the decision denying the motion for a new trial. (Rec., 71.) The defendants then entered a motion in arrest of judgment and assigned as reason therefor, that the verdict exceeded the amount of damages sued for, as appears by the summons, and claimed in the declaration before amendment, but the court denied the motion and rendered judgment upon the verdict, less the amount remitted, to which decision the defendants severally excepted. (Rec., 71.)

Errors Assigned.

1st. The Circuit court erred in directing the jury not to allow a credit, in fixing the damages, for any of the proceeds of the bonds deposited by the Cook County National Bank, and which had been sold by the secretary of the treasury, beyond the sums credited in the statements of the sixth auditor, introduced in evidence.

2d. The Circuit court erred in excluding from the jury all testimony relating to the claims of McArthur against the United States, growing out of the two contracts for furnishing iron work for the public buildings at San Francisco and Lincoln.

3d. The Circuit court erred in directing the jury to allow nothing in the way of credits on account of work done and material furnished by McArthur in connection with the public buildings at San Francisco and Lincoln.

4th. The Circuit court erred in receiving in evidence the statement certified by the Acting Auditor of the Treasury for the Post-office Department, dated March 10, 1880, and in refusing to exclude the same from the jury.

5th. The Circuit court erred in excluding from the consideration of the jury the letter dated April 25, 1877, sent by McArthur to F. W. Palmer, in answer to the demand of said Palmer for the payment of moneys, on the order of the Postmaster General.

6th. The Circuit court erred in rendering judgment for a greater sum than the amount claimed as damages

in the summons, and in permitting an amendment to the declaration fixing the *ad damnum* at a greater sum than claimed in the summons.

7th. The Circuit court erred in receiving improper evidence, in excluding competent evidence, in the charge to the jury, in allowing an amendment to the declaration and in rendering judgment against the plaintiffs in error.

Points and Authorities.

I.

The Circuit court erred in directing the jury not to allow a credit, in fixing the damages of any of the proceeds of the bonds deposited by the Cook County National Bank beyond the sums credited in the statements of the Sixth Auditor introduced in evidence.

The Secretary of the Treasury was authorized to designate the Cook County National Bank as a depository for public moneys, and require a deposit of sufficient bonds to protect the government.

Rev. Stat., 5153.

Cook County National Bank v. *United States*, 107 U. S., 445.

When the Cook County National Bank failed it was indebted to the United States $194,889.47, consisting of $155,305.47, deposited by the Collector of Internal Revenue, and $39,584, deposited by the postmaster. The Secretary of the Treasury held bonds of the par value of $150,000, which he sold for $174,582.02, and used the proceeds to liquidate the entire amount deposited by the collector, and applied the balance as a credit on the account of the postmaster, leaving the entire deficiency on the postmaster and his sureties.

The effect of this action was to increase the verdict $23,768.17 beyond what it should have been.

Where there are two bonds, with different sets of sureties, held by the United States, and a payment is made,

it is the duty of the officer receiving the same to apply such payment *pro rata* on the debts for which the sureties are liable. In this case it was the duty of the Secretary of the Treasury to distribute the proceeds of the bonds *pro rata* to reduce the liability of the sureties of the collector, and the sureties of the postmaster, in the same proportion.

United States v. *Amory*, 5 Mason, 455.
United States v. *Wardell et al.*, 5 Mason, 82.
United States v. *Eckford's Executors*, 1 How., 250.
United States v. *January*, 7 Cranch, 572.
Jones v. *United States*, 7 How., 681.
Cremer v. *Higginson*, 1 Mason, 323.
United States v. *Linn*, 2 McLean, 501.
Brander v. *Phillips*, 16 Pet., 121.
Postmaster General v. *Norvell*, Gilpin 106.
Meyers v. *United States*, 1 McLean, 493.
Bank v. *Hill*, 10 Pick., 129.
Colby v. *Copp*, 35 N. H., 434.
Tavene v. *Bennett*, 11 East, 36.
Shaw v. *Picton*, 4 B. & C., 715.

II.

The Circuit court erred in excluding from the jury the testimony relating to the claims of McArthur against the United States growing out of the two contracts for furnishing iron work for the public buildings at San Francisco and Lincoln.

The twelfth plea of McArthur, and the seventh plea of

the sureties, were pleas of set-off, claiming an amount due from the United States to McArthur for certain work and materials furnished in pursuance of two contracts read in evidence. The proper steps had been taken to bring these claims before the court by way of set-off.

Rev. Stat., Secs. 951 and 952.
United States v. *Wilkins*, 6 Wheat., 135.
United States v. *Fillebrown*, 7 Pet., 48.
Gratiott v. *United States*, 15 Pet., 370.

The twelfth plea of McArthur, and the two pleas of set-off, made the evidence excluded by the court material in determining the issues formed thereby. The court erroneously excluded all of the evidence tending to support such pleas.

III.

The Circuit court erred in receiving in evidence the statements certified by the acting auditor of the treasury for the post-office department, dated March 10, 1880, and in refusing to exclude the same from the jury.

Statements were made and certified, showing balances due from McArthur prior to the commencement of the suit. Demand was made for such amounts, and suit commenced to recover them. More than three years afterwards, without notice to McArthur or his sureties, and without their knowledge, the auditor changed such balances by transferring the sum of $14,865.91 from the account of Palmer, the successor, to the account of McArthur.

There was no evidence before the auditor to justify this action. The statements did not contain copies of the

money orders on which the change was made. The auditor had lost jurisdiction and it had been transferred to the court where the suit was pending. The supplementary certificate was not evidence for any purpose on the trial of the case.

United States v. *Collier*, 3 Blatch., 325.
United States v. *Jones*, 8 Pet., 388.
Ex parte Randolph, 2 Brock., 447.
United States v. *Kuhn*, 4 Cranch C. C., 401.

IV.

The Circuit court erred in excluding from the consideration of the jury the letter dated April 25, 1877, sent by McArthur to F. W. Palmer, in answer to the demand of said Palmer for the payment of money on the order of the Postmaster General.

The court admitted a certified copy of a letter written by Palmer to the post-office department in which he said he had demanded the amount due from McArthur by sending to him a letter. The defendants offered in evidence the answer of McArthur to such demand, but the court excluded McArthur's answer. In this there was error.

V.

The Circuit court erred in rendering judgment for a greater sum than the amount claimed as damages in the summons, and in permitting an amendment to the declaration fixing the *ad damnum* at a greater sum than claimed in the summons. The practice in the United

States Circuit court was governed by the practice in the State of Illinois. By that practice a suit is commenced by the issuing of a summons, which must state the cause of action and the amount claimed.

A summons was issued in an action of debt, claiming as debt $300,000, and as damages $100,000. A declaration was filed immediately thereafter, making the same claim. The verdict of the jury was, for debt, $300,000, damages, $116,559.14. The district attorney remitted $7,910.64, and judgment was rendered for the balance, $108,648.50. In this there was error.

Chitty on Pleadings, 1, 16 Am. Ed., 349.
Russel et al. v. *City of Chicago*, 22 Ill., 287.

ARGUMENT.

ISSUES OF FACT.

The question as to whether McArthur, as postmaster, complied with the statute, by depositing post-office money in the sub-treasury at Chicago, was not in issue in this suit. The Circuit court, in his charge to the jury, commenced by stating that McArthur was not authorized to deposit post-office funds in the Cook County National Bank after the sub-treasury was established at Chicago. No particular exception was taken to that statement, but it is proper to refer to it, for the purpose of showing that a false issue was presented to the jury.

This suit was not only against the principal in the bond, but against his sureties. Whatever may have been the liability of McArthur, the liability of his sureties was fixed by the condition of the bond. There is no provision in that condition requiring the postmaster to deposit funds received by him in the United States treasury, nor in a sub-treasury. At the time the obligation was entered into, there was no such institution at Chicago. By the acts of Congress a postmaster, when selected for that purpose, was made a depositary for post-office funds to be deposited by other postmasters. In this manner he not only held moneys received in the transaction of the business of the principal office in his charge, but also moneys deposited with him. Drafts were drawn as the business of the department required upon such a depositary. In the transaction of his business he was subject to the orders of the department. The bond in this case was constructed with reference to that state of affairs. The first duty

specified in the condition was that McArthur should, according to law, and the instructions of the Postmaster General, once in three months, or oftener, if required, render an account of his receipts and expenditures to the post-office department. There is no allegation in the declaration that he failed to comply with this condition; without doubt such accounts were rendered. The next provision in the condition is that McArthur should pay the balance of all moneys that should come to his hands from postage collected, postage stamps, and stamped envelopes sold, or money orders issued by him or from any other source connected with the postal service, in the manner prescribed by the Postmaster General of the United States.

The first, second, third, and fourth breaches in the declaration alleged a failure on the part of McArthur to pay the balance of moneys that came to his hands; the first and third being an allegation as to what are denominated "postal funds," and the second and fourth, what are called "money-order funds."

The next condition in the bond is that McArthur should keep safely, without loaning, using, depositing in any *other banks*, or exchanging for other funds than as allowed by law, all the public money collected by him or otherwise, at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out. The fifth breach alleges that a large sum of money was collected by him and otherwise placed in his possession, and that he did not keep safely without using the same until it was ordered by the Postmaster General to be transferred or paid out, but, on the contrary, he used and converted the same to his own use, before the same was ordered by the Postmaster General to be transferred or paid out.

The next condition of the bond is that McArthur should do and perform as agent and depositary for the post office department all such acts and things as may be required of him by the Postmaster General, and should fully account with the United States, in the manner directed by the Postmaster General for all moneys, postage-stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money-orders, blanks, mail-keys, and other property and papers which he as postmaster or as agent and depositary should receive for the use and benefit of the post-office department. The sixth breach alleges that McArthur, as agent and depositary for the post-office department, received for the use and benefit thereof divers moneys, etc., for which he ought to have accounted with the United States, yet, though requested, he did not account for the same with the United States in the manner directed by the Postmaster General.

The pleas in proper form traversed these several charges, and on the trial it devolved on the United States to prove them. It will be observed that the bond proceeded upon the theory that the deputy postmaster at Chicago was subject to the control of the Postmaster General and not an independent officer governed solely by the provisions of law. The Postmaster General, by the terms of the bond, was the government of the United States. Whatever might be the duties and obligations of the deputy postmaster at Chicago as prescribed by law, his sureties in executing this bond only guaranteed that he should discharge the same in accordance with the directions of the Postmaster General. Even if the act of Congress did require McArthur to deposit all the post-office funds coming into his hands in the sub-treasury, yet if the Postmaster General directed him to deposit in

the Cook County National Bank, or elsewhere, or to retain in his office a portion of such moneys, the sureties could not be held liable for a failure to deposit money in the sub-treasury. They only became responsible for the obedience of McArthur to the orders of the head of the department. It was assumed in the construction of this bond that such orders would conform to the law, and there was no express condition inserted therein which would require the sureties to see that the principal in his action obeyed the provisions of the statutes. There is not only no such provision in the bond, but there is no allegation in the declaration and no issue made on which a recovery could be had by reason of a failure of McArthur to deposit money in the sub-treasury.

It appears that McArthur as postmaster, had funds derived from three several sources: *first*, postal funds, which was money coming into his hands from the sale of stamps, box rents, etc., *second*, from moneys placed in his hands to conduct the money-order business; and, *third*, moneys received by him as public depositary of funds left with him by other postmasters in pursuance of orders of the post-office department. Two accounts were kept of these moneys, each separate from the other. The first embraced those moneys specified in the first and third classes above mentioned, and the other, those specified in the second.

The money-order business was not only kept separately from the other transactions of the post-office, but as money had to be paid out in conducting the business upon orders drawn by other postmasters whenever presented, it was impossible to deposit funds belonging to that branch of the business in the sub-treasury. There is no statute in existence which requires such money to be deposited in

the treasury of the United States. If there was a national bank designated as a depository for public moneys, such funds could be deposited there, as they were subject to check by the postmaster in his official capacity. Moneys mebraced within the class of postal funds might all be deposited in the sub-treasury provided suitable arrangements were made by the Postmaster General for drawing the same to be used in the payment of current expenses of the office.

It appeared, however, from the testimony in this case that the arrangement made by the Postmaster General was that McArthur should not deposit all of the postal funes in the sub-treasury, but that he should retain such amount as was necessary to meet the expenses of the office. This McArthur did, and in doing so, was obeying the orders of the Postmaster General. The result of such an order was a loss of money to the United States, for which a recovery has been wrongfully had in this case against the sureties. The contention of the sureties is that they are not liable according to the terms of the bond for such loss. It is necessary that current expenses of a post-office should be met, and the custom has always been to do just what McArthur did.

As to money-order funds, as they could not be deposited in the sub-treasury, and conduct the business by the daily payment of money orders substantially as a bank, it became the duty of McArthur to keep those moneys safely and in the manner directed by the Postmaster General. It appears from the evidence that when he entered on the duties of his office there was no sub-treasury established at Chicago, but the Cook County National Bank had been before that time designated as a depositary for public moneys of the United States by

the Secretary of the Treasury, who had as security from the bank to cover such moneys government bonds of the par value of $150,000. McArthur was directed by the Postmaster General to deposit public moneys in his hands in that bank. He obeyed the order and placed therein money-order funds which were credited on the books of the bank as money-order funds. He also deposited in pursuance of such direction postal funds, and these were credited on the books of the bank in an account headed, "John McArthur, P. M."

The bank failed and its doors were closed January 18, 1875, and at that time there was of post-office moneys in the bank $39,584. The contention of the sureties is that they are not liable for these moneys. A portion of this amount was paid by a credit derived from the proceeds of the $150,000 of bonds, leaving a balance which was included in the judgment recovered in this case. The plaintiffs in error contended that they were not liable for this balance, and if for any part thereof, they were not responsible for so much of said moneys as constituted money-order funds.

These questions were in issue as matters of fact, not only by the pleas which traversed the several breaches of the declaration, but by the tenth plea of McArthur, on which issue was joined. (Rec., 10.)

The twelfth plea of McArthur (Rec., 11) and the seventh plea of the sureties (Rec., 33) were pleas of set-off, and issue was joined upon them. (Rec., 49 and 50.)

These pleas sought to set off against any amount due the United States, claims of McArthur for material and labor on a sub-treasury building at San Francisco, and a custom-house and court-house at Lincoln, Nebraska, furnished under contracts with the United States.

These pleas also sought to present as proper claims to be set off the money deposited, not only in the Cook County National Bank, but also the money deposited in the Home National Bank of Chicago. These amounts, it may be proper to remark, amounted to the entire sum for which McArthur was in default. There was no evidence whatever in this case to sustain the averments in two of the breaches, that McArthur had converted money to his own use or for his own purposes. On the contrary, it appeared that his defalcation was covered by the moneys deposited in these two national banks.

On the trial evidence was introduced to sustain the pleas of set-off, and it was shown that the claims designated therein had been presented to the post-office department and disallowed, in order to bring them within the provisions of sections 951 and 952 of the Revised Statutes, and thus enable the court to entertain them, according to the provisions of those sections as construed by this court. After evidence tending to sustain the pleas had been introduced, and it was also proved by the introduction of a letter from the Sixth Auditor of the Treasury that there had been allowed on such claims the sum of $2,819 (Rec., 14), the court, of its own motion, excluded the testimony relating to the claim against the United States in favor of McArthur, growing out of the two contracts for furnishing iron work for such public buildings. (Rec., 68.)

The court, on the issues of fact, submitted to the jury the certified statements of the accounts and balances read in evidence, and directed them to allow the amount of such balance, together with interest from the time the money was demanded of McArthur, and if there was no such demand, then from the commencement of the suit,

giving credit, however, for $3,039.74, which had been received in dividends from the Cook County National Bank, and which was not credited in the statement. The other questions of fact were withdrawn from the consideration of the jury.

Under the issues of fact as to the amount of money which McArthur had in his hands at the time suit was commenced and for the purpose of fixing the amount of damages, the defendants introduced testimony showing that the Cook County National Bank was a designated depository under section 5153 of the Revised Statutes, and that the bank had pledged bonds of the face value of $150,000 as required by the statute to secure the United States for any public moneys that might be deposited therein; that when the bank failed there was $155,305.47 in the bank which had been deposited by the Collector of Internal Revenue, and that there was deposited by McArthur as postmaster $39,584; that the Secretary of the Treasury had sold such bonds for $174,582.02 and that from such proceeds he had canceled the entire amount due for moneys deposited by the Collector of Internal Revenue and gave credit to McArthur for the balance of such proceeds, amounting to about $19,239.05, leaving unpaid of the sum due from the Bank of the United States $20,344.95, and that it was alleged to be postal funds and money-order funds for which the sureties of McArthur were responsible.

The court did not exclude this evidence, but he directed the jury in the charge to allow nothing on the account in addition to the sum which had been credited, as shown by the statement introduced in evidence on the part of the United States. Under this direction the balance due from the bank was included in the verdict and judgment rendered against the plaintiffs in error.

I.

THE CIRCUIT COURT ERRED IN DIRECTING THE JURY NOT TO ALLOW A CREDIT, IN FIXING THE DAMAGES, OF ANY OF THE PROCEEDS OF THE BONDS DEPOSITED BY THE COOK COUNTY NATIONAL BANK, BEYOND THE SUMS CREDITED IN THE STATEMENTS OF THE SIXTH AUDITOR INTRODUCED IN EVIDENCE.

Section 5,153 of the revised statutes, under title 62 National Banks, is as follows:

"All national banking associations, designated for that purpose by the secretary of the treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. The secretary of the treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue, or for loans or stocks."

Some of the facts presented in this record were before the court in the case of *Cook County National Bank* v. *United States*, 107 U. S., 445. The question there pre-

sented was as to whether the United States was a preferred creditor for the moneys deposited by McArthur. It was held that the government was not entitled to such preference. Mr. Justice FIELD, in the opinion, referring to the statute authorizing the designation of a national bank as a depositary, makes use of the following language:

"In the second place, when the banks are made depositaries of public moneys and employed as financial agents of the government, it is the duty of the secretary of the treasury to require them to give satisfactory security by the deposit of United States bonds, or otherwise, for the safe-keeping and prompt payment of the public money deposited, and for the faithful performance of their duties as financial agents. The amount of the security which the secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore, given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. Rev. Stat., Sect. 5,497. The government can thus always have security, limited in amount only by the judgment of the secretary of the treasury, for public moneys deposited with any national bank."

On the trial of this case, it was a material question as to how much money McArthur had on hand subject to the order of the Postmaster General when the suit was commenced, and also as to the amount of damages the jury should assess.

The declaration alleges that a draft was made upon McArthur, and demand for payment, June 27, 1877, for a part of the money, and for a further sum on the 13th of February, 1880; the first demand being made prior to

the commencement of the suit, and the second while the suit was pending. McArthur denied, in answer to the demand, in the letter which was excluded from the jury, that he had the amount demanded. The Cook County National Bank closed its doors January 18, 1875. It was then indebted to the United States in the sum of $194,889.47, on account of public moneys deposited by the collector of internal revenue, and by the postmaster. On that indebtedness payments were made for the bank out of the proceeds of bonds pledged as security for such indebtedness, in April, 1875. Whatever money was then paid, not only satisfied *pro tanto* the debt of the bank to the United States, but it also reduced the liability of the postmaster and collector of internal revenue. McArthur was entitled to a credit of the amount which should have been thus applied. Such indebtedness of the bank to the United States was made up of moneys deposited by the collector of internal revenue to the amount of $155,305.47, and the moneys deposited by McArthur, as postmaster, to the amount of $39,584. The secretary of the treasury held at that time bonds of the par value of $150,000, which had been pledged to secure the government when the bank had been designated as a depository for public moneys. These bonds were sold, and produced $174,582.02. As the total proceeds were insufficient to satisfy the entire debt, the secretary gave credit to the bank for $155,305.47, the whole amount deposited by the collector of internal revenue, and thereby discharged the collector and his sureties from the liability for the funds deposited in that bank. He then gave credit for the balance, amounting to $19,239.05, to the bank on account of moneys deposited by McArthur as postmaster. Under his direction, the post-office depart-

ment credited McArthur in his account with that sum, applying $11,803.98 as a credit on the postal account, and $7,435.07 on account of money-order funds.

The contention of the appellants is, that it was the duty of the secretary of the treasury to have distributed the proceeds of the bonds *pro rata* upon the two accounts. If he had done so, there would have been credited to McArthur $34,737.36, or $15,498.27 more than was actually credited; there would have been credited to the Collector of Internal Revenue $139,844.70, instead of $155,305.47. Had the proper amount been credited to McArthur, it would have stopped interest on the said sum of $15,498.27; it would have decreased the amount of the verdict in this case $23,768.17. It will thus be seen that it is a substantial and material question in this case as to whether a credit of the proper amount was made to McArthur from the proceeds of the bonds pledged by the Cook County National Bank.

The right of McArthur to have a credit from the proceeds of the bonds was admitted by the proper officers of the government, in giving credit for the $19,239.05; the only question is as to whether the proper amount was credited to McArthur.

It is immaterial for the consideration and decision of this question whether these moneys were lawfully deposited in the bank or not. It may be admitted that the moneys were placed there contrary to the provisions of law, yet, as the United States has received from the bank money in part payment of such indebtedness, it becomes a satisfaction to that extent. It was as much the duty of the Collector of Internal Revenue to deposit his funds with the assistant treasurer in Chicago, as it was the duty of the postmaster to deposit his. Indeed there is

no evidence in this case that any authority was given by a superior officer to the collector to deposit funds in the bank, while there was a direction given to the postmaster by his superior to deposit funds in that bank. The statute authorized the secretary of the treasury to designate the Cook County National Bank as a depository for public moneys, and gave him authority to require a pledge of United States bonds in such sums as he thought necessary to protect the government. It seems that in the exercise of such discretion, he took an insufficient amount of security.

There is no dispute in regard to the facts. The question is, what was the legal duty of the secretary of the treasury upon the facts, in disposing of the proceeds of the bonds? He applied them so as to discharge one public officer and his sureties from all liability, and threw the whole of it on another public officer and his sureties. He had no authority to make such an application of the proceeds. The law required him to distribute them upon the two accounts *pro rata*, and to treat the two officers and their sureties alike. The general rule as to transactions between private individuals gives the right to a debtor, in making a part payment, to direct the application to be made, and in the absence of such direction, authorizes the creditor to make the application; in the absence of any direction by either, the law determines it according to the interests and rights of the respective parties. But that rule does not apply to a case like this, where money has been received by a public officer on account of a public officer; they are governed by the law, and the law applies it regardless of the wishes of the parties. In a case of this kind, where the rights of two sets of sureties are involved, the law requires the application of payments

in such a way as to give no advantage to either over the other. This is in accordance with justice and equity, and with repeated decisions of the courts.

The case of the *United States* v. *Amory*, 5 Mason, 455, is exactly in point. In that case the United States filed a bill against an assignee of an insolvent firm to compel satisfaction of certain debts due to the United States out of funds in the hands of the assignee. $20,433.60 had been paid into court and the question was as to how such amount should be applied. It appeared that the insolvents, Adams & Amory, were indebted to the United States upon custom-house bonds upwards of $92,500, and upon these bonds were various sureties. Judgment had been obtained on most of the bonds. Appleton was a surety to the amount of $16,576.50, and there were other sureties to the amount of about $70,000. Appleton petitioned the court to have so much of the money paid in as might be necessary applied in discharge of the bonds upon which he was surety. This application was resisted, and it was claimed that the funds should be apportioned among all the bonds, *pro rata*. On this state of facts the court say:

"In the first place, as to the authority of the court, I have no doubt, that, sitting in equity, it has a right to restrain the *United States* from exercising its power in cases of priority injuriously to the sureties upon the various bonds to which the priority applies. Whenever there is a general assignment of all the estate of a debtor, and the *United States* have various debts secured by various sureties, I conceive, that the aggregate constitutes but a single debt, and that the priority attaches to it as a whole. All payments therefore that are received by the *United States* under such circumstances, are to be deemed

payments upon the whole debt, and they must be applied *pro rata* to the extinguishment of all. It is not like the case of payment by a debtor where, he failing to make an appropriation at the time of the payment, the creditor may then appropriate it as he pleases. In cases of assignment and other cases where the right of priority attaches, the provision is in effect, that the fund shall be first applied to the extinguishment of debts due to the *United States*. But the assignees are to apply the fund generally, not to one particular debt, but to all debts due to the *United States*. It would be a violation of their duty to apply it to one debt, to the fraud or injury of sureties. If they are to pay generally, without any specification in the assignment of any preference or priority of any particular debt of any creditor, the law deems each debt as equally entitled to be extinguished *pro rata*; for equality is in such cases equity. The assignor has not entrusted the assignees with any authority to create a preference, and the creditor has no right to demand it. He must make payments as the debtor has provided, or as the law upon his omission has appropriated them."

* * * * *

"It is very clear to me, therefore, that in this case the whole fund ought, upon principle, to be applied *pro rata* in extinguishment of all the priority debts due to the *United States*."

Another case is that of the *United States* v. *Wardwell et al.*, 5 Mason, 82. In that case there was a bill in equity. Bourne was purser in the navy and gave a bond to the United States with sureties on the 14th of April, 1814. Another bond was given April 30, 1817, with other persons as sureties. October 5, 1826 the accounts were adjusted at the treasury department and a balance found

due to the United States on the 30th of April, 1817, and a further balance November 10, 1823. November 14, 1823, Howe, one of the defendants, was appointed administrator on Bourne's estate, and on the 22d of September, 1826, he paid to the district attorney for the use of the United States $4,968.42. Howe claimed the right to apply the same in part payment of the balance found due April 30, 1817, and the district attorney claimed the right to hold the same in part payment of either of the balances due at the election of the officers of the treasury.

Mr. Justice Story in delivering the opinion said:

" Then as to the payment made to the district attorney by the administrator of *Bourne*. Generally speaking, the debtor has a right to make the application of payments, as he chooses; if he omits so to do, the creditor, having different debts, may make the application to which he pleases. If neither party makes any application, the law will adjust it by its own notions of the equity and justice of the particular case. It is plain, that the officers of the treasury department had no power to make an absolute application of the present payment by the administrator, to the liquidation of the last balance, unless the law justifies it upon general principles. If either party had a right to direct the application, it was the administrator of *Bourne*; and if applied according to his direction, it goes to the reduction of the first balance.

" But I doubt, exceedingly, whether an administrator is subrogated in this respect to all the rights which the debtor himself would have if living. Especially do I doubt it, in case the estate is insolvent. When a debtor here dies insolvent, all his estate is distributable among his creditors having priorities, such as the *United States*,

the state, and creditors for charges of the last sickness, and of the funeral of the party. In such cases of administration, it seems to me that all the demands of each creditor form one consolidated debt, and that the payments made are to be *pro rata* upon the whole, to be applied in the same way towards the discharge of the whole. The administrator has no right at the instance, or for the benefit of third persons, to direct the payment to be applied on account of any particular debt. He is bound to pay, on all debts, a *pro rata* sum. If this be so as to ordinary creditors, the circumstance that the *United States* have a priority does not change the duty imposed by law; for if the assets are not sufficient to pay all the debts due to the *United States*, the same reason applies; that is, that the payment shall be *pro rata* on all. The administrator acts, not for himself, nor for sureties, nor upon personal preferences, but as a trustee for the benefit of all creditors *pari passu*. And I think the law requires him, in the execution of the trust, to distribute the burthen and the benefits equally among all the creditors, without preferences, and without prejudice to the rights of any sureties. Upon these principles, my opinion is that the sum paid by the administrator ought to be applied, as of right, to both balances, discharging each *pro rata*, in the proportion which the respective amounts bear to the whole sum paid. *Perris* v. *Roberts* (1 Vern. R., 34) proceeded on principles which afford a just analogy."

The case of the *United States* v. *Eckford's Executors*, 1 How., 250, involved the question where there were several bonds with different sureties given by Swartwout, collector of customs at New York. Moneys were paid to the United States and credit given on a continuous account, without distinguishing between the different terms of office and different bonds with different sureties.

The court say in the opinion by Mr. Justice McLEAN:

"The rule as to the appropriation of payments by debtor or creditor in the ordinary transactions of business, is earnestly relied on as applicable to the present case. And all the leading authorities on the subject are referred to. In the case of *Devaynes* v. *Noble, &c.*, 1 Mer., 606, the doctrine which governs the application of payments was elaborately considered. But the applicability of this doctrine is not admitted. We think the rule established by this court in the case of *The United States* v. *January and Patterson*, 7 Cranch., 572, is the true one. In that case the court say: 'The debtor has the option, if he think fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application the creditor may make it; if he also neglects to apply the payment, the law will make the application.' But the court add: 'A majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case where different sureties under distinct obligations are interested.'

"The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights

cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

"If the collector be in default for a preceding term, it is the duty of the treasury department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of the collector is not his money. Without a violation of his duty he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is the fair result of the doctrine advanced. For, if such appropriation is properly made by the treasury, in

payment of a defalcation of the collector, before the commencement of the current term, it must follow, that the sureties for such term are responsible for the amouut thus paid."

See also

U. S. v. *January*, 7 Cranch, 572.
Jones v. *U. S.*, 7 Howard, 681.
Cremer v. *Higginson*, 1 Mason, 323.

As between different sets of sureties on the official bond of an officer, the ordinary rules for the appropriation of payments do not apply, but the courts will apply the payments so as to avoid injustice. So where a default exists at the time of making a new bond, and the payment for the first quarter is in excess of the debts for that quarter, the balance will be applied to the reduction of the existing default. And where a general payment is made some years after the expiration of the term for which the bond was given it will be applied to the general balance.

United States v. *Linn*, 2 McL., 501.

A factor with the proceeds of the goods of the principal in his hands cannot apply such proceeds to the payment of the bills of his principal alone, drawn against the proceeds, in preference to bills drawn by his principal and a surety, which surety was obtained on the credit of the goods in the factor's hands.

Brander v. *Phillips*, 16 Pet., 121.

Where a public officer has given different bonds with different sureties, his payments must be so appropriated as to give each bond credit for the moneys respectively due, collected and paid under it.

Postmaster General v. *Norvell*, Gilp., 106.

The government cannot apply money received by a receiver of public moneys, and paid over after the date of the bond, in discharge of a previous defalcation to the prejudice of the new sureties.

Myers v. *U. S.*, 1 McLean, 493.

If several notes are joined in one suit and the execution recovered in such suit is satisfied in part only, a surety for some of the notes may insist upon a proportional application of the money for which he is liable.

Bank v. *Hill*, 10 Pick. (Mass.), 129.

If a payment is made generally to a party who holds a debt due to himself, and another due to himself and the plaintiff, he is bound as between himself and the plaintiff to apply the payment ratably upon the two debts.

Colby v. *Copp*, 35 N. H., 434.

Goods sold by a broker for a principal not named, upon the terms specified in the usual bought and sold notes (delivered over to the respective parties by the broker), of "payment in one month, money" may be paid for by the buyer, and discounted by the broker within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment, such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer.

Favenc v. *Bennett*, 11 East, 36.

Where the same agent had a bill account with the grantor of several annuities, for the payment of which A became surety, and in consequence of a letter written by an attorney, in the name of the grantees at the instance of the agents, demanding payment of the arrears of the annuities from the grantor and his surety, a sum of money was paid under circumstances from which it was to be collected, the money was intended to be specifically appropriated to the annuity account, and the agent applied it to the bill account. *Held*, that this was a misapplication, and that the money ought to be appropriated *pro rata* among the annuitants.

Shaw v. *Picton*, 4 B. & C., 715.

The Circuit court disregarded these rules and principles, and notwithstanding the facts were without dispute, the jury were directed to allow nothing in the verdict in addition to what had been allowed in the statements in evidence on account of the funds which the United States received from the sale of bonds, which had been deposited with the Cook County National Bank as a designated depository. (Rec., 70.) An exception was taken to this portion of the charge.

The statements referred to by the court were those of the Sixth Auditor, which had been introduced in evidence on the part of the plaintiff. These statements show a credit as a part of the proceeds of the bonds to McArthur of $11,803.98. (Rec., 58.) From the testimony, the defendants were entitled to an additional credit of the fair proportionate share of such proceeds, which would have been, as above stated, $34,737.36. In this the court erred, and for this error the judgment ought to be reversed, and the case remanded for a new trial.

This evidence was properly before the jury, not merely for the purpose of determining the damages and the amount of money which McArthur had when the suit was commenced, but also in support of the tenth and twelfth pleas of McArthur, and the seventh plea of the sureties. This evidence proved every averment of McArthur's tenth plea, on which an issue of fact was joined, and therefore it should have been given to the jury for their consideration. The twelfth plea of McArthur and the seventh plea of the sureties, were pleas of set-off, on which issue was joined, and among the claims set up in such pleas was one for an allowance of the money deposited in the Cook County National Bank. For this reason the evidence should have been given to the jury.

II.

THE CIRCUIT COURT ERRED IN EXCLUDING FROM THE JURY THE TESTIMONY RELATING TO THE CLAIMS OF MCARTHUR AGAINST THE UNITED STATES GROWING OUT OF THE TWO CONTRACTS FOR FURNISHING IRON WORK FOR THE PUBLIC BUILDINGS AT SAN FRANCISCO AND LINCOLN.

The pleas of set-off claim an amount due from the United States to McArthur arising from two contracts made by him with the supervising architect of the treasury department for furnishing iron-work on the custom house at San Francisco, and court house and post-office at Lincoln, Nebraska. The proof showed without any controversy that such contracts were made, and they were read in evidence. By virtue thereof McArthur was entitled to receive for the building at San Francisco $14,581.78, and by the contract on the building at Lin-

coln $3,581.18. Some payments had been made, but evidence was introduced tending to prove that a balance was still due. Evidence was also introduced tending to show that he was entitled to damages by reason of delay caused by the officers of the United States, and evidence was also introduced tending to prove the amount of such damages.

And there was other evidence consisting of a letter dated March 15, 1882, written by the sixth auditor, in which he stated that on these contracts there had been allowed to McArthur the sum of $2,800.19; that this was due was without any controversy whatever. For the purpose of bringing within the provisions of sections 951 and 952 of the Revised Statutes, it was proved that an application had been made by John Alston to the sixth auditor to allow such claims, and that such officer had disallowed them, as he stated in his letter, so that the questions might be submitted to the court on the trial of this case.

Notwithstanding a compliance with the sections of the statute which authorized the court to entertain the claims and determine as to their justness and the amounts due thereon, if anything, the court of its own motion excluded the evidence relating to the claims growing out of the two contracts; to which decision an exception was taken. (Rec., 68.)

The action of the court must have been upon the theory that a set-off could not be allowed, and that the pleas on which issue had been taken were immaterial. No reason appears in the record for the decision of the court. It is only a matter of inference that such was the view taken by the judge. In this he was clearly in error. It is immaterial now to determine what was due to McArthur

upon these claims. That was a question which should have been left to the jury. It is to be observed, however, that it was conceded $2,819 was due to McArthur on these claims, and for which, he received no credit in the verdict of the jury.

Sections 951 and 952 of the revised statutes are as follows, namely:

"§ 951. In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit, at the treasury, by absence from the United States, or by some unavoidable accident."

"§ 952. No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the post-office department, unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court, that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident."

These two sections are very broad in their terms, and have been held to allow a party sued by the United States to set off, not only a legal, but also an equitable, claim that he may have against the government. It will be observed

that the construction of these sections, in allowing the set-off of an equitable claim, goes one step farther than the rule of set-off, at common law, as it obtains in the state courts; and the reason is, that not until the year 1855, could a private individual enforce a claim against the general government by a legal proceeding. And although, in that year, the court of claims was established, the rule of law regarding set-off, which we have stated, has ever since been administered in the federal courts.

A leading case, which corroborates our position in this regard, is that of the *United States* v. *Wilkins*, 6 Wheaton, 135. In this case the court, in construing the sections of the revised statutes which we have above cited, make use of the following language:

"The fourth question is, whether the defendants can be permitted to claim a credit for the sums due him, under the contract, in this suit. The answer may materially depend upon the true construction of the act of Congress of the 3d of March, 1797, C. 74, providing for the more effectual settlement of accounts between the United States and public receivers. The third section of that act provides that upon suits instituted against any person indebted to the United States, judgment shall be rendered at the return term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, etc. The fourth section then provides, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in

whole or in part, unless it shall be proved, to the satisfaction of the court, that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident. The terms of these sections are very broad and comprehensive. The third section manifestly supposes that not merely legal, but equitable credits ought to be allowed to debtors of the United States, by the proper officers of the treasury; and the fourth section prohibits no claim for any credits which have been disallowed at the treasury, from being given in evidence by the defendant at the trial. There being no limitation as to the nature and origin of the claim for a credit, which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only as the defendant, in equity and justice, shall be proved to owe to the United States. If this be the true construction of the act, which we do not doubt, the defendant might well claim a credit in this suit for the sums due to him, even if they had grown out of distinct and independent transactions, for he is legally, as well as equitably, entitled to them."

The rule announced in *United States* v. *Wilkins*, 6 Wheaton, 143, was approved by this court in *United States* v. *Fillebrown*, 7 Peters, 48.

In *United States* v. *Hawkins*, 10 Peters, 132, the doctrine of the Wilkins case was not only approved, but it was held that it was not necessary for a defendant to present his claims for decision to the department prior to the commencement of the suit; that such action might be taken after the suit was commenced, and at any time prior to the trial. The court say:

"In regard to so much of the exception which objects to the introduction of the bills, orders, or documents claimed as credits in the defendant's supplemental answer —because they had not been presented to the proper accounting officers, and disallowed previous to the commencement of the suit—we remark: It has never been the practice of the circuit courts, in suits under the law of the 3d of March, 1797, to deny to defendants a claim for credits against the United States, because they had not been presented and disallowed before the commencement of the suit. The practice to allow a claim for credits, after the suit has been commenced, is sustained by the spirit and letter of the third and fourth sections of the statute."

In *Gratiot* v. *United States*, 15 Peters, 370, an exception, which excluded evidence, was sustained; it appearing in that case that the claims had been presented and disallowed. It was there remarked that it was wholly immaterial whether the claim was a legal or an equitable one, as in every case it constituted a good ground of set-off or deduction.

Watkins v. *United States*, 9 Wall., 764, was a suit upon a marshal's bond where claims by way of set-off were presented, the court saying:

"The right of set-off did not exist at common law, but

is founded on the statute of 2 George II., c. 24, s. 4, which in substance and effect provided that where there were mutual debts between the plaintiff and the defendant, * * * one debt may be set against the other, and such matter may be given in evidence under the general issue. Set-offs might, ever after the passage of that act, be made, in a proper case, between plaintiff and defendant, but it never extended to suits between the government and individuals, and since the decision in the case of *United States* v. *Giles*, it has never been pretended that, in suits 'between the United States and individuals,' any claim for credit can be admitted at the trial, unless it appears that the claim had previously been presented and disallowed, or was otherwise brought within the fourth section of the before-mentioned act of Congress. Whether the claim for credit is a legal or equitable claim, if it has been duly presented to the accounting officers, and has been by them disallowed, it is the proper subject of set-off under that act, but it cannot be adjudicated in a federal court unless it has been so presented and disallowed. The rejection of such a claim by the accounting officer constitutes no objection to it as a claim for set-off, as it cannot be admitted in evidence unless it has been presented and disallowed, as required by the act of Congress. Such claims as fall within that act are not specifically defined, and in view of that fact, this court has held that the act intended to allow the defendant the full benefit, at the trial, of any credit, whether it arises out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt for which he is sued, subject, of course, to the requirement of the act that the claim must have been presented to the proper accounting officers, and have been by them disallowed."

III.

THE CIRCUIT COURT ERRED IN RECEIVING IN EVIDENCE THE STATEMENT CERTIFIED BY THE ACTING AUDITOR OF THE TREASURY FOR THE POST-OFFICE DEPARTMENT, DATED MARCH 10, 1880, AND IN REFUSING TO EXCLUDE THE SAME FROM THE JURY.

On the trial the United States, for the purpose of proving the averments of the declaration, read in evidence, with objection, after the bond, a statement of the general postal account of McArthur, certified by the sixth auditor under the seal of his office, dated November 20, 1877, covering the entire period in which McArthur was postmaster, and showing a balance of $52,123.74 due from McArthur to the United States. There was next introduced another statement of the money order account certified in like manner, bearing date the same day, November 20, 1877, covering the whole period in which McArthur was in office, and showing a balance of $8,244.07 due from him on that account. (Rec., 58.)

This suit was commenced November 26, 1877, so that these statements were certified just before the commencement of the suit. The evidence also shows that these were the sums demanded of McArthur prior to the commencement of the suit on the 27th of June, 1877. (Rec., 60.)

The district attorney next offered in evidence a further statement of the money-order account certified by the auditor March 10, 1880, while the suit was pending. By this statement it appears that on the 10th of March, 1877, there was a balance due to the United States, per transcript furnished to the United States attorney, on money

orders issued, $8,244.07. To that item another was added under the date of February 10, 1880, which reads as follows:

"To amount improperly claimed by John McArthur on account of money orders alleged to have been paid, which amount has been transferred to the credit of F. W. Palmer, P. M., Chicago, Ills., $14,865.91."

These two amounts were added together, making $23,109.98. (Rec., 59.) A copy of a letter from Frank W. Palmer, postmaster, certified by the auditor, bearing date February 25, 1880, was read in evidence for the purpose of showing that a demand had been made by letter upon McArthur and his sureties for this amount, $23,-109.98. (Rec., 61.)

McArthur testified that said statement, showing a transfer of the sum of $14,865.91 from the account of Palmer to his own account, was not so transferred in pursuance of any agreement with him; that he never had any knowledge or information of such change; that he never had any hearing in regard to it, and he disputed its correctness. (Rec., 68.)

On this state of facts objection was made to receiving the supplementary statement of March 10th, 1880, in evidence, and a motion made to exclude the same. The court received it, declining to exclude it from the jury, and exception was taken. (Rec., 61–68.)

It is insisted that the Circuit court erred in receiving this supplementary statement where the account of McArthur was altered as it stood before the commencement of the suit. The principal objections made to its reception in evidence were because it appeared to have been made before the commencement of the suit; because the

auditor appeared to charge said sum by transferring that amount from the account of Palmer, the successor of McArthur; and because such transfer had been made without any notice, and without any evidence being furnished to him or his bondsmen of such liability; and for the further reason, that the court had acquired jurisdiction of the subject-matter and persons before such change in the account was made. (Rec., 60.)

It is admitted that a statement of an account kept with a postmaster, certified under the seal of office of the Sixth Auditor, is *prima facie* evidence, which may be introduced in a trial of a suit against the postmaster and his sureties. For that reason no objection was made to such statement certified prior to the commencement of the suit. But, it is insisted that when the account had been made up, a balance struck, and such sum demanded of McArthur, prior to the commencement of the suit, and then suit brought for the recovery of such balances, that the auditor could not thereafter increase the amount of the balance by transferring from the successor's account a sum of money to the account of McArthur. The action of the auditor in fixing the amounts and making demand therefor, was judicial. So long as he had control of the business it might be competent for him to make corrections of the account. Certainly it would be proper for him to make clerical corrections upon the same principle that a court might correct its own judgment in like respects. But, when he considered the case, decided it, fixed the amount due, entered it upon his books, certified that amount, made a draft for it, which was presented, and the amount demanded from McArthur, and then caused suit to be brought for such amount, his jurisdiction and control ended. The question of the

amount due was then submitted to the court. Jurisdiction of the subject-matter and of all parties had been acquired by the court and the right of the auditor to act in his *quasi* judicial capacity had ceased. The proceedings were analogous to a decision of a lower court and an appeal to a higher. It would be just as competent for a Circuit court to increase the amount of its judgment after an appeal from that judgment by one of the parties to the Supreme court.

The action of the auditor in adjusting accounts is supposed to be upon quarterly accounts rendered by the postmaster, and the duty confided to the auditor is arithmetical in part, and in part he has the authority to decide as to the legality and correctness of any item entered in the postmaster's accounts. In this case it appears that McArthur's term of office ceased; that he had rendered his accounts, which were adjusted; that he had turned over the office to his successor, and an account had been opened with the Government with such successor. It must be supposed that when the office was transferred, proper vouchers and receipts were passed. It must also be supposed that McArthur had been credited with all property and moneys turned over to his successor, who had been charged therewith. It could not be within the power of the auditor on this state of facts, three years after a suit had been commenced, based upon the balances as they then appeared, on the application of Palmer, to transfer from his account the large sum of over $14,000 to that of McArthur, with the view of charging not only McArthur, but his sureties, with such additional amount. Force is added to the objection when it appears that such transfer was made without any notice or information given to the parties on whom the liability

was thus thrown. The auditor was without jurisdiction. He did not take the ordinary steps required in every court of justice called upon to determine such questions. It must be inferred that Palmer made application to the department and succeeded, by some unknown influence in relieving himself of this large sum of money, and imposing it upon the sureties of McArthur. Certainly no such transaction ought to be sanctioned by a court of justice.

The only question is, as to whether the certificate made under these circumstances, is evidence at all. If there was a just claim against McArthur for that amount, the United States should have presented the evidence to the court, where witnesses could have been examined and cross-examined, and a further hearing had. This rule would impose no hardship upon the United States. It is the same which would prevail in a suit between private persons. Advantage enough is given by the statute when it authorizes certified statements of transactions prior to the commencement of the suit, to be used as *prima facie* evidence. If the auditor can prepare such a statement, pending the suit, which can be offered in evidence after suit commenced, it can be done the day before the trial as well as a year before it. No opportunity is offered in such a case to meet the statement, no means exist to ascertain the ground on which the auditor acted.

We are not without authority upon this question. The principles for which the plaintiffs in error now contend have been determined in their favor.

In *United States* v. *Collier*, 3 Blatch., 325, this question arose. In that case a suit was brought on the bond of the collector of revenue for Upper California. The treasury department made up and stated the account

of the defendant several times, to wit: On the 7th of June, 1851, in which they claimed a balance of $791,-065.31; on the 24th of September, 1851, in which they claimed a balance of $789,925.35; on the 26th of December, 1851, in which they claimed the balance of $750,933.80; on the 7th of March, 1853, in which the commissioner of customs made up the balance of $216,-712.43, and the auditor stated it at $181,797; and fifthly, on the 22d of September, 1853, in which a balance was claimed of $241,329.47. Each of those five several balances, as thus stated, the defendant, by letter from the treasury department accompanying the statement of account, was required to pay or deposit with an assistant treasurer of the United States. The account of September 23, 1853, contained no credit for the sum of $118,-546.05, paid on the 16th of September, 1853.

Judge BETTS, in delivering the opinion, said:

"It is at best questionable whether the comptroller, had any authority to restate and augment the debit side of the account at any time after the first statement had been adopted and repeated in the subsequent treasury statements of September and December, 1851, and March, 1853. *Ex parte* Randolph, 2 Brock, 447, 473; *United States* v. *Kuhn*, 4 Cr. C. C. 401. More particularly would the right of accounting officers to change the treasury statement, by adding a claim of interest, after a payment had been received from the defendant which overpaid the principal really due upon the account as it stood when the payment was made, be open to exception; for it is the addition of interest to the demand after the 16th of September, 1853, when the defendant paid into the treasury $118,546.05, which produces the balance of $9,611.59 claimed to be due on the statement

of September 22, 1853. The technical objection to varying the account is, that it creates a new cause of action after suit brought; but one more vital to it on the merits is, that the treasury department acts in a judicial capacity in determining the charges to which the defendant is subject, and is not competent to vary that adjudication subsequently to his prejudice. The decision of the department, within the rules prescribed for the exercise of its powers, is, in effect, final. *United States* v. *Jones*, 8 Pet., 375. We think, therefore, that the plaintiffs are not entitled to set up a charge of interest made in the restatement of the defendant's account on the 22d of September, 1853, and to renew that charge in this action."

It was not sufficient to charge McArthur in gross with over $14,000 on money orders alleged to have been paid. McArthur was entitled to a statement of each one of these orders, and, more, to a copy of each one of them. This change seems to have been based on a claim that McArthur had received credit for the payment of money orders which he had not paid, but which were subsequently paid by his successor, Palmer. If so, McArthur was entitled to information as to each one of such orders so alleged to have been erroneously credited to him, in order that he might investigate the correctness of the same. The auditor could have had no personal knowledge in regard to these facts. He must have acted upon information furnished to him, and as to such information his certificate would not be any evidence.

In *United States* v. *Jones*, 8 Peters, 388, there were certain items in such an account read in evidence, and the court held that the items were not sufficiently proved by being charged in the account and certified under the act of Congress.

The court say:

"The officers of the treasury may well certify facts which come under their official notice, but they cannot certify that which does not come within their own knowledge.

"In the case of the *United States* v. *Buford*, 3 Pet., 12, the court say that 'an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books.'

"The issuing of the warrants to Orr was an official act, 'in the ordinary mode of doing business in the department,' and the fact is proved by being certified as the act of Congress requires.

"But the execution of bills of exchange and orders for money on the treasury, though they may be 'connected with the settlement of an account,' cannot be officially known to the accounting officers. In such cases, however, provision has been made by law, by which such instruments are made evidence, without proof of the handwriting of the drawer.

"In the second section of the act of 3d March, 1797, it is provided that 'all copies of bonds, contracts or other papers, relating to or connected with the settlement of any account between the United States and an individual, when certified by the register to be true copies of the original on file, and authenticated under the seal of the the department, may be annexed to the transcripts, and shall have equal validity, and be entitled to the same

degree of credit which would be due to the original papers, if produced and authenticated in court.'

"Under this provision, had copies of the bills of exchange and orders, on which the above items were paid to Smith and McCormick, been duly certified and annexed to the transcript, the same effect must have been given to them by the Circuit court, as if the originals had been produced and proved. And every transcript of accounts from the treasury, which contains items of payments, made to others, on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorized such payments. And so in every case where the government endeavors, by suit, to hold an individual liable for the acts of his agent; the agency on which the act of the government was founded, should be made to appear, by a duly certified copy of the power.

"The defendant would be at liberty to impeach the evidence thus certified, and, under peculiar circumstances of alleged fraud, a court might require the production of the original instrument. This, however, would depend upon the exercise of the discretion of the court, and could only be enforced by a continuance of the cause until the original should be produced."

* * * * *

"The accounting officers of the treasury act upon the accounts, and give to the credits, as entered, their official sanction. The vouchers of an individual are all submitted to these officers, and their decision has always been considered as conclusive upon the government, but not so as against the individual. The law expressly provides that rejected items may be allowed by the court. The law makes the treasury account, when properly certified,

evidence; and every item correctly charged in the account is *prima facie* established by the transcript. If, as in the present suit, certain items are charged to an individual, which the treasury officers cannot know officially to be correct, and no other evidence in support of them be adduced, they should be rejected, as was done by the Circuit court in this cause; but no such objection can be made to the credits entered on the account against Orr. They are all founded upon supplies which he furnished to the troops of the United States under his contract. These credits have been all examined and allowed by the accounting officers of the treasury department, and all vouchers on which this action of the treasury took place, remain in that department."

According to these decisions, even if it was proper for the auditor to have made a certificate which could be received in evidence while the suit was pending, it should have embraced copies of the alleged money-orders which were charged against McArthur, and in the absence of such copies, the certified statement was not evidence.

See also *Ex parte Randolph*, 2 Brock, 447.
U. S. v. *Kuhn*, 4 Crouch C. C., 401.

IV.

THE CIRCUIT COURT ERRED IN EXCLUDING FROM THE CONSIDERATION OF THE JURY, THE LETTER DATED APRIL 25, 1877, SENT BY MCARTHUR TO F. W. PALMER, IN ANSWER TO THE DEMAND OF SAID PALMER FOR THE PAYMENT OF MONEY ON THE ORDER OF THE POST-MASTER GENERAL.

It appears from the evidence that a demand was made by Palmer upon his predecessor and his sureties for the

balance claimed to be due to the United States. Such demands were not made in person, but by letters addressed to McArthur and to his sureties. The demand letter appears to have been made April 17, 1877. To that letter McArthur made answer April 25, 1877, and sent the same by mail, the same channel in which he had received the letter from Palmer. The court excluded this letter from the consideration of the jury. It appears on pp. 63 and 64 of the record. If Palmer had made a demand in person, and McArthur had made reply thereto, the entire conversation of both parties would necessarily have been evidence. The fact that such an interview was had by letter instead of orally, does not change the rule. McArthur made his answer to the demand, and he was entitled to have it considered by the jury. By reference to the letter it will be seen that he then raised the question as to the correctness of his account, and denied that he was liable for the amount charged against him. This was proper for the consideration of the jury, and ought to have been admitted in evidence.

V.

THE CIRCUIT COURT ERRED IN RENDERING JUDGMENT FOR A GREATER SUM THAN THE AMOUNT CLAIMED AS DAMAGES IN THE SUMMONS, AND IN PERMITTING AN AMENDMENT TO THE DECLARATION FIXING THE AD DAMNUM AT A GREATER SUM THAN CLAIMED IN THE SUMMONS.

The action was debt, brought on the bond, which was in the penal sum of $300,000. The summons, which was issued in accordance with the statute of Illinois, claims the debt of $300,000, and the damage of $100,000. (Rec., 1.) The declaration agreed with the summons. (Rec.,

7.) The verdict of the jury was for debt $300,000, damages $116,559.14. (Rec., 52.)

Some two months afterwards, on the argument of a motion for a new trial, the district attorney remitted from that verdict $7,910.64, and at the same time moved for leave to increase the *ad damnum* in the declaration. Subsequently the court allowed the motion to amend, and denied the motion for a new trial. Exception was taken to the decision allowing the amendment. (Rec., 71.)

A motion in arrest of judgment was then entered upon the ground that the verdict exceeded the amount of the damages sued for. The motion was denied, and judgment rendered for the amount of the verdict, less the sum remitted. Exception was taken. (Rec., 71.)

Although the declaration was amended so as to increase the *ad damnum* to a greater sum than the verdict, yet, the summons remains unchanged.

It may be proper to call attention to the remittitur. The jury made an error in computing the interest, making it over $4,000 too large, even computing it from the extreme points permissible by the evidence. They also failed to give credit for the $3,039.74 which had been received by the United States in dividend from the Cook County National Bank, and for which no verdict had been given in the statement. The district attorney for the purpose of correcting these errors entered his remittitur, but his action did not avoid the question made here in regard to the set-off claimed by the defendants.

Chitty on Pleading, Vol. 1, 16, Am. Ed., 349, says:

"The jury cannot give more damages than are laid at the end of the declaration. And if they should do so, the surplus should be *remitted* before judgment has been entered."

The practice in Illinois, which must control in this case, is well settled. In *Russell et al.* v. *City of Chicago*, 22 Ill., 287, the court say:

"It is also urged that the court below erred in finding the damages at $3,611.09 when the declaration only claimed $1,000. It has been repeatedly and uniformly held by this court that in actions of debt on penal bonds, assigning breaches under the statute, that it is error, if the jury fail to find both the debt and the damages. And that it is not form but substance, and the omission cannot be supplied by the court. And no rule of law is better established than that in an action of debt the plaintiff can not recover damages beyond the amount claimed in his declaration. And this rule has been applied by this court to recoveries on penal bonds for the performance of covenants or conditions. *Fornier* v. *Faggott*, 3 Scam. R., 347; *Stephens* v. *Sweeney*, 2 Gilm. R., 375. In these cases upon penal bonds, the judgments were reversed because the damages found on the trial exceeded the *ad damnum* laid in the declaration, and they are in point and decisive of this case. Whatever our opinion might have been were the question an open one, we regard the practice too long and too well settled by our adjudications to be now disturbed. To do so would lead to more inconvenience than benefit."

It is true that after the verdict the court allowed an amendment of the *ad damnum* in the declaration. In this there was error, because the amount of damages claimed in the declaration must conform to the amount claimed in the summons. If any amendment could have been allowed, it should have been made in both instruments. The error in the verdict was not cured by merely changing the declaration.

W. C. GOUDY,
For Pffs. in Error.

FILED
MAR 20 1890
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 214.

CARLISLE MASON AND JOHN ALSTON

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY FOR PLAINTIFFS IN ERROR.

W. C. GOUDY,
For Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 214.

CARLISLE MASON AND JOHN ALSTON

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY FOR PLAINTIFFS IN ERROR.

To enable the Court to understand the errors assigned I made a statement of the pleadings, issues, and evidence in the argument for the plaintiffs in error. The Solicitor General seems to have understood that part of the argument as a contention that nothing was due to the United States and the recovery wholly wrong. No such proposition was made or intended. It is admitted that on this record the United States was entitled to judgment for some amount. The contention is that the judgment is too large and errors were committed on the trial which prevented the jury from properly deciding the issues in the case. If this contention is sustained the judgment must be reversed and a new trial awarded, on which the errors will be avoided, and the jury will then decide the proper amount to be recovered.

The only questions to be considered here are those raised by the assignments of error.

FIRST ERROR.

The plaintiffs in error claim that the Secretary of the Treasury should have distributed $174,582.02, the proceeds of bonds belonging to the Cook County National Bank, *pro rata* to reduce the liability for moneys deposited by the collector of internal revenue and the postmaster instead of discharging the bank from all liability for collector's funds and the balance only to reduce such liability for post-office funds, as he did do.

The Solicitor General admits the principle asserted to be correct and sustained by authority; but it is contended that the principle and authorities do not apply to this case.

In order to sustain this contention, the Solicitor General rests on presumptions and not facts proven by the evidence; more, upon presumptions which are contradicted by the evidence.

It was proved that the Cook County National Bank was designated as a depository for public moneys of the United States by virtue of the authority of § 5153 of the Revised Statutes (Record, 62.) By that section such a banking association was to be a depository "*of public money, except receipts from customs.*" When such designation was made it was a proper place for the deposit of public money by a collector of internal revenue as well as by a postmaster. This provision was section 45 of the National Bank Act of June 3, 1864, vol. 13, 113. At that time there was no internal revenue department, which was created by an act of June 30, 1864, vol. 13, 223. Section 33 of the internal revenue act reads as follows:

§ 33. *And be it further enacted*, That the several collectors shall, at the expiration of each and every month after they shall, respectively, commence their collections, transmit to

the Commissioner of Internal Revenue a statement of the collections made by them, respectively, within the month, and pay over monthly, or at such time or times as may be required by the Commissioner of Internal Revenue, the moneys by them respectively collected within the said term and at such places as may be designated and required by the Commissioner of Internal Revenue; and each of the said collectors shall complete the collection of all sums assigned to him for collection as aforesaid and shall pay the same into the Treasury, and shall render his accounts to the Treasury Department as often as he may be required; and the Secretary of the Treasury is authorized to designate one or more depositories in each State for the deposit and safe-keeping of the moneys collected by virtue of this act, and the receipt of the proper officer of such depository to a collector for the money deposited by him shall be a sufficient voucher for such collector in the settlement of his accounts at the Treasury Department; and the Commissioner of Internal Revenue may, under the direction of the Secretary of the Treasury, prescribe such regulations with reference to such deposits as he may deem necessary."

On the 3d of March, 1865, the internal revenue act of 1864 was amended, and by section 3 of that act all moneys received by the officers of internal revenue were required to be paid "*daily into the Treasury of the United States under instructions from the Secretary of the Treasury, * * * anything in any law to the contrary notwithstanding.*" Vol. 13, 482.

Section 16 of the act of 1865 repealed all provisions of any prior act inconsistent with the provisions of this act. Vol. 13, 486.

It would seem to be clear that after the passage of the act of 1865 a collector of internal revenue could not deposit in a national bank at all.

There was an attempt to carry forward these provisions in the Revised Statutes; that of section 3, act of 1865, in § 3210, and that of section 33 of act of 1864 in § 3211.

These two sections read as follows:

"SEC. 3210. The gross amount of taxes and revenues received or collected by virtue of this title or of any law hereafter enacted providing internal revenue shall be paid by the officers receiving or collecting the same daily into the Treasury of the United States under the instructions of the Secretary of the Treasury, * * * and a certificate of such payment, stating the name of such depositor and the specific account on which the deposit was made, signed by the Treasurer, Assistant Treasurer, designated depository or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue: *Provided*, That in districts where from the distance of the officer, collector, or agent receiving or collecting such taxes and revenues from a Government depository the Secretary of the Treasury may deem it proper, he may extend the time for making such payment, not exceeding, however, in any case, a period of one month."

"SEC. 3211. The Secretary of the Treasury is authorized to designate one or more depositories in each State for the deposit and safekeeping of the money collected by virtue of the internal revenue laws, and the receipt of the proper officer of such depository to a collector for the money deposited by him shall be a sufficient voucher for such collector in the settlement of his accounts at the Treasury Department."

On March 3, 1873, Congress established the office of an assistant treasurer at Chicago (17 Stat. at Large, 543), giving him the same authority, &c., as such officers at other places. The act revoked the authority of the collector of customs at Chicago to receive public money on deposit.

The system for the care of the public money embraced the United States Treasury, at Washington, Assistant Treasurers where appointed, national banking associations designated as depositories, collectors of customs authorized to receive money on deposit, postmasters for post-office funds of other postmasters. These ranked in order named above. Where there was a sub-treasury it superseded those of an inferior kind. There was no use for a bank designated as

a depository. Authority existed in the heads of Departments to give special directions to meet public exigencies. For example, a postmaster could pay from his receipts the current expenses of his office when permitted by the Postmaster General.

There are many provisions showing it to be the duty of all officers receiving public money, with such exceptions, to deposit all moneys in the Treasury.

Almost any of these receivers might also be disbursing officers. This was true of collectors of internal revenue.

Rev. Stat., § 3144; Stat. at Large, vol. 13, 483.

Sections 3210 and 3211 are to be construed with reference to all of these facts. It was not intended to give the Secretary of the Treasury power to designate a national bank as a place for a collector of internal revenue to deposit when there was a sub-treasury at the same city. A consideration of the original provisions in 1864 and 1865 makes this clear. Reference to sections 3620 and 3621 shows that the collector of internal revenue was to deposit in a sub-treasury where there was one, and not elsewhere. By the first of these sections the Secretary can only select a bank where there is no Treasurer or Assistant Treasurer.

Whatever the authority of the Secretary may have been, there is no proof whatever that he exercised the power conferred by section 3211 or ever directed the collector of internal revenue to deposit in the Cook County National Bank. We are not permitted to *presume* that such a power was exercised from the mere fact that the collector did deposit there. The evidence that such bank was designated by virtue of the provisions of section 5153 excludes the presumption that it was done under section 3211. If it was, the Government should have proved it on the trial. There is no evidence that the debt to the United States for revenue stood on any different ground from that for post-office money. There is no proof that the Secretary found any difference.

On the contrary, if the Cook County Bank was designated under section 5153 it was for the deposit of any and *all public money except that received from customs.* The security was to cover all public money so deposited. This record expressly shows that McArthur was directed by the Postmaster General to deposit there; that subsequently, when the sub-treasury was established, the direction was to deposit there, except enough for current expenses. As to so much the prior direction stood in force.

It is earnestly insisted that the bonds of the Cook County Bank were to secure the payment of all public money in the bank at the time of failure. The application of the proceeds was a payment by the bank to the United States, and, according to the principle settled by the authorities cited in the main argument, the money ought to have been used to reduce the debt of the collector and postmaster *pro rata.*

SECOND AND THIRD ERRORS.

The Solicitor General says that the defendants did not come within the provisions of sections 951, 952, Rev. Stat., because there was no certified transcript from the office of the Sixth Auditor and that there was no proof that the letters to and from that officer were proven.

The application for allowance of the claims and the decision of the auditor were read in evidence; for that purpose they were either proved or the genuineness was admitted. The transcript, if produced, would be a copy of these letters; the certificate was not necessary except as proof of a secondary kind. The original decision was produced, which was primary evidence.

It was held in Watkins *vs.* U. S., 9 Wal., 764, that it was not necessary that the claims should be a good set-off according to the rules of law. The cases cited by the Solicitor General, therefore, do not apply.

It is said the claims could not be considered because the

cause of action passed to the assignee in bankruptcy eleven days before McArthur went out of office. By the transcripts of the auditor it appeared that over $60,000 was due, and that did not accrue in eleven days. It appeared that McArthur had been in default from the failure of the bank.

But by the bankrupt law the United States was a preferred creditor, and it appears the entire proceeds in the hands of the assignee were for the United States (Record, 68). These claims of McArthur could not be used to pay any other creditor.

Again, this is a question of the amount due from McArthur to the United States. If there was a sum due from him to the Government and another sum due to him from the Government, the one being deducted from the other gave the true amount due. It is immaterial by what name it is called—whether set-off or recoupment. The only question is, What is the balance? The assignee took nothing under these circumstances.

FOURTH ERROR.

It is admitted that the statements of the accounts made by the Sixth Auditor, read in evidence, showing the amounts due before suit commenced and for which demand was made were properly received without objection. They came within the terms of section 889. These were copies of the quarterly returns of McArthur approved by the auditor, showing a balance due; but the subsequent paper, to which objection was made, was not a copy of any return made by McArthur. It was a copy of a changed account previously adjusted. It was a copy from the office of the auditor merely showing a balance as adjusted and demanded, with an addition of one item of $14,865.91, which, from the language of the charge, must have been the result of numerous items not disclosed. This does not come within the provisions of any statute. It is not a copy of papers in this office, but a mere conclusion.

It is admitted by the Solicitor General the action of the auditor is judicial, and such it has been pronounced to be by this Court in cases cited in the former argument If so, there must some time be an end of the authority of the officer to act. This point was said to be in U. S. *vs.* Collier, 3 Blatchford, 325, when action was taken and decision made by adjusting the account and striking the balance. It is conceded that clerical mistakes may be corrected, but that does not help this case. Here there was judicial action of the highest character. The former decision was changed, and that without notice or hearing, upon what evidence we know not.

Whether the authority of the auditor ceased on fixing the balance demanded of McArthur and his sureties or not, it certainly ought to end when the court acquired jurisdiction to hear and decide all questions. There ought not to be two judicial authorities acting at the same time. The logical result of the reasoning to sustain the ruling of the court would be to allow the auditor to change the amount due even after judgment by the court.

The Solicitor General infers from the entry made in this statement that McArthur had received credit for payment of money orders which were afterwards paid by Palmer, and that McArthur had been guilty of a gross fraud. If so, the proof should have been made in the court, where a fair investigation could be had, and not in the chamber of the auditor with no litigant but Palmer, who was making over $14,000 by the decision.

The voucher for the credit was the paid money order; if transmitted by McArthur to sustain his account he presented the requisite proof. Palmer could not have sent the order later. The auditor had nothing before him to justify action other than the orders. We may infer, and not be out of the way, that Palmer presented *ex parte* affidavits to throw this sum from himself onto McArthur, a thing there was not authority for. If the auditor could certify to anything it

was to documents and papers filed in his office and not conclusions of his own. Such is the rule laid down in U. S. *vs.* Jones, 8 Peters, 383.

SIXTH ERROR.

It is said this is a technical error. The question is one of orderly judicial proceedings. The Solicitor General seems to think the point that the summons differed from the amended *ad damnum* was not made in the court below. In this he is mistaken. After the declaration had been amended and exception taken thereto, a motion in arrest of judgment was made, and a reason assigned in support of that motion was "that the verdict exceeded the amount sued for." The motion was denied and exception taken. Judgment followed, to which exception was allowed. (Record, 71.)

The contention is that the declaration ought not to have been amended so as to claim a larger amount than that claimed in the summons, and that even after amendment the judgment could not be rendered for a greater sum than that specified in the summons. In the Illinois cases cited by the Solicitor General the amendment of the declaration did not exceed that in the summons. The case of Tomlinson *vs.* Earnshaw, 112 Illinois, 311, does not go beyond that. Liberal as the practice is as to amendments, there can scarcely be an amendment inconsistent with the summons; if one is amended the other must be. A case can scarcely be found where the plaintiff was allowed to recover more than he claimed in the writ.

If a new trial can be had of this case proper amendments could be allowed; but we would hope to change the result of the former trial, so that the judgment would be less than the sum named in the summons.

W. C. GOUDY,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
MAR 3 1890
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLILE MASON AND JOHN ALSTON, plaintiffs in error,
vs.
THE UNITED STATES, defendant in error.
} No. 214.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLILE MASON AND JOHN ALSTON, plaintiffs in error,
vs.
THE UNITED STATES, defendant in error.
} No. 214.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

This was an action in the circuit court of the United States for the northern district of Illinois, brought by the United States on the official bond of John McArthur, postmaster at Chicago, against him and his sureties to recover damages for his alleged breach of the bond in failing to account for and pay over to the United States, on demand, money which it was claimed came into his hands as such postmaster. McArthur and his sureties filed separate pleas. He pleaded *non est factum* and traversed

the breaches assigned. They pleaded *non est factum* and a series of set-offs. The circuit court rendered judgment against McArthur and the sureties for $108,648.50. The plaintiffs in error, who were two of the eight sureties, prosecute this writ of error to reverse the judgment of the circuit court.

STATEMENT OF FACTS.

The evidence, as it is shown by the bill of exceptions, beginning at page 55 of the transcript of the record, discloses the following state of facts:

John McArthur was appointed postmaster at Chicago in December, 1872 (Record, page 56). He gave bond in the sum of $300,000, dated January 10, 1873 (Record, page 55), with eight sureties (Record, page 57), of whom the plaintiffs in error were two. The condition of the bond (Record, page 56) was that he should

> Well and truly execute the duties of said office according to law and the instructions of the Postmaster-General, and faithfully, once in three months or oftener if thereto required, render accounts of his receipts and expenditures, as deputy postmaster, to the Post-Office Department in the manner and form prescribed by the Postmaster-General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for postage collected, postage-stamps, and stamped envelopes sold or money-orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster-General of the United States for the time being, and shall keep safely, without loaning, using, depositing in other banks, or exchanging for other funds than as allowed by law,

all the public money collected by him or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster-General to be transferred or paid out, and when such orders for transfer or payment are received shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as agent and depositary for the Post-Office Department, all such acts and things as may be required of him by the Postmaster-General; and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster-General, for all moneys, postage-stamps, stamped envelopes, bills, bonds, notes, drafts, receipts, vouchers, money-orders, blanks, mail-keys, and other property and papers which he, as postmaster or as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post-Office Department.

McArthur entered upon the duties of his office February 15, 1873 (Record, page 62). At that time there was no assistant treasurer at Chicago. He was then a Government depositary, with whom neighboring postmasters were directed to make deposits, of which he was required to render a monthly statement to the Postmaster-General. His own deposits, both of regular postal receipts and money-order funds, he made with the Union National Bank, by direction of the Postmaster-General. Postal receipts were the moneys received by him from sale of postage-stamps and box-rents. Money-order funds were moneys received from sale of money-orders, and those remitted to him to pay money-orders from other postmasters. By direction of the Postmaster-General, he transferred his deposits from the Union National Bank, where

he first made them, to the Cook County National Bank, which was then designated as a Government depository. Some time after this transfer, on June 14, 1873, McArthur received a letter from the Third Assistant Postmaster-General (Record, page 63), notifying him that other postmasters would be required to deposit with the assistant treasurer, just then located at Chicago, and he would cease to be a depositary for them, and further directing him, after closing up his business as depositary, to himself make daily deposits of the proceeds of his office with the assistant treasurer, "reserving a sufficient sum to meet current expenses."

McArthur made deposits with the assistant treasurer, reserving some $40,000 a month for current expenses, which he continued on deposit at the Cook County National Bank (Record, page 62). That bank had been designated as a depository for public money of the United States by the Secretary of the Treasury under section 5153 Revised Statutes. On the 18th of January it suspended business and closed its doors (Record, page 62). McArthur had on deposit there at that time, in two accounts, one as postmaster and the other as "money-order business," $39,584, of which considerably less than half was in the money-order account.

At the time of the suspension there was due from the bank for money deposited by the internal revenue collector at Chicago $155,305.44 (Record, page 62).

There was in the United States Treasury to secure Government deposits in the bank, $150,000 of par value of United States bonds. These the Secretary of the Treasury ordered sold, and realized $174,582.02 there-

from. By his order the proceeds were applied to pay the internal revenue deposits in full, and the balance, $19,239.05, was applied to reduce the debt of the bank for the postmaster's deposits. Further dividends from the bank on these deposits amounted to $3,039.74 (Record, page 62).

In the year 1875 McArthur entered into two contracts with the United States, one to furnish the iron work for the sub-treasury at San Francisco and the other to furnish the iron work for the post-office at Lincoln, Nebr. (Record, page 64). On the 27th of February, 1877, before his account with the Government for these contracts was finally adjusted and when there was still due him on them several thousand dollars, McArthur became a bankrupt, and one Ray was appointed his assignee in bankruptcy (Record, page 68). Eleven days later, on the 10th of March, 1877, he retired from the postmastership. On April 17, 1877, the Postmaster-General drew a draft on McArthur for $52,129.94, which was, on the 27th of June, 1877, presented but not paid (Record, page 60), and his sureties were also notified and payment was demanded of them without avail. The amount so demanded was for general post-office funds, and was what the Sixth Auditor's books of account showed to be due from McArthur after crediting him with $11,803.98 received from sale of the United States bonds already spoken of (Record, page 58).

Demand was also made for the balance shown by the Auditor's books to be due on money-order account after crediting $7,435.07, received from the sale of the deposited United States bonds (Record, page 62). This balance amounted to $8,244.07. Neither the general pos-

tal-fund account, nor the money-order account, the balances on which are above given, contained the credit of dividends paid by the bank, because they were not then declared.

Summons issued in this action on the 26th of November, 1877. From a transcript of the Sixth Auditor's books of money-order account, taken off in March, 1880, it appears that he credited McArthur in April, 1877, with the payment of money-orders to the amount of $14,865.91, because McArthur falsely reported them paid, and that McArthur's successor in office was obliged to pay them (Record, page 59). This increased the balance on money-order account against McArthur from $8,244.07, as at first reported, to $23,109.98, a demand for the payment of which was mailed to McArthur and his sureties. McArthur testified that he did not receive this letter of demand (Record, page 68). By leave of court the United States, in May, 1880, were allowed to amend their declaration in the assignment of the breach as to money-order funds, and to increase the damages from $8,244.07 to $23,109.98 (Record, page 51).

On the 19th of June, 1878, the sureties made application under sections 951 and 952 to the Sixth Auditor for the allowance of certain credits and set-offs. They claimed, first, that McArthur had on deposit as postmaster $14,100 with the Home National Bank of Chicago, which bank knowingly permitted him to convert and apply the money to his own use, and that the same bank permitted him to use other public funds in the same way; second, that the Cook County National Bank, a duly-designated depository of the United States, suspended payment, when post-office moneys

were on deposit there by McArthur in accordance with an order of the Postmaster-General, amounting to $40,644, of which only $21,404.95 had been recovered; and, third, that there was due at the commencement of this suit, and still continued due, $5,000 "for work and material duly furnished for the sub-treasury building at San Francisco and the custom-house at Lincoln, Nebr." The first and second amounts were claimed as credits and were said to be included in the amounts set forth in the declaration in this suit, and they were all, including the balance due on the contracts, claimed to be just set-offs, legal and equitable (Record, pages 65 and 66). The Sixth Auditor rejected them all (Record, page 67). He disallowed the claim based on the building contracts, because the amount due, or to become due, to McArthur could not then be stated (Record, page 67).

The account was finally adjusted in 1882, March 15, and the balance due on the contracts was found to be $2,819 (Record, page 64). It appears (Record, page 68) that Ray, the assignee in bankruptcy of McArthur, made some effort to collect this balance. But there is nothing in evidence to show what has been done with it.

ARGUMENT ON THE FACTS.

From what has been said, it appears, then, that McArthur, when he retired from office, and after being credited with the proceeds of the United States bonds sold, owed to the United States—

On account of general postal funds	$52,129.94
On account of money-order funds	23,109.98
	$75,239.92

which, with interest from the dates when demand was made for the various sums in 1877 and 1880 (Record, pp. 60, 61), down to May, 1886, the time of the trial (Record, p. 86), easily reached the amount of the judgment, after giving credit for the dividends paid by the Cook County National Bank.

It seems to be contended by counsel for plaintiff in error (plaintiffs' brief, 36) that the entire sum for which McArthur was in default would be covered by deposits which he made in the Cook County National Bank and the Home National Bank for the Government, and that it does not appear that he converted any of the money for which he was in default to his own use.

The evidence will not sustain this contention. In the first place, there is no direct evidence that he ever deposited any public money at all in the Home National Bank. There was an averment in the seventh plea of the sureties (Record, page 33) upon which the United States joined issue by a replication *de injuria*, etc., that McArthur had deposited large sums in the Home National Bank for the United States, but no evidence was introduced to sustain it. The only reference to a deposit in that bank in the bill of exceptions is contained in the application of John Alston, one of the plaintiffs in error, to the Sixth Auditor for credits (Record, pp. 65 and 66), in which he states on oath that McArthur deposited $14,100 of public money in the Home National Bank and converted it to his own use, and that he did the same with $25,000 other public funds, and with $15,000 additional.

The only part, then, of McArthur's deficit of $75,253.06 which is to be attributed to the failure of a bank was

$20,344.95, and this sum was reduced by subsequent dividends credited in the judgment rendered to $17,305.21. This result leaves unexplained more than $55,000 of a deficit in McArthur's accounts when he left the office. By section 5495, this is evidence of embezzlement and sustains the two breaches assigned in which he is charged with converting money to his own use.

Again, in the argument on the issues of fact (plaintiffs' brief, 30) it is contended that the circuit court in charging the jury that McArthur was not authorized to deposit post-office funds in the Cook County National Bank, presented a false issue to the jury. The contention is that there was nothing in the condition of the bond requiring the postmaster to deposit funds received by him, in the United States Treasury or in a sub-treasury; that when the bond was signed there was no assistant treasurer in Chicago, but the postmaster was the depositary; that the bond was constructed with reference to this state of affairs, and that consequently when an assistant treasurer was established in Chicago, a violation of the law requiring the postmaster to deposit with him would not be a breach of the bond.

The bond was conditioned generally that John McArthur should well and truly execute the duties of said office according to law and the instructions of the Postmaster-General. The law in force when the bond was made required (section 3848, R. S., June 8, 1872) all postmasters in cities having an assistant treasurer to deposit the proceeds of their office with such treasurer, and the parties must be held to have contracted with a view to

the possibility of the location of such officer at Chicago. Therefore the violation of law by McArthur in making a deposit of public moneys in a bank when he should have made it in the United States Treasury was a breach of the bond, and the fact that by reason of such deposit the money was lost was not an excuse for the first, second, third, fourth, and sixth breaches, which described a failure by McArthur to pay to his successor, on the order of the Postmaster-General, public moneys which had come into his hands.

Nor can the argument of counsel for plaintiffs in error be sustained that the orders of the Postmaster-General would excuse the bondsmen for a violation of law by McArthur, in withholding postal receipts when the law enjoined upon him the duty of making a deposit of them. The orders of the Postmaster-General referred to in the bond are lawful orders, *i. e.*, orders within his lawful discretion. If they were unlawful they were void, and obedience to such orders would not be compliance with the condition of the bond, because the orders therein spoken of are, by necessary implication, lawful orders. A violation of McArthur's legal duty as postmaster in obedience to such unlawful orders would therefore be a breach of the general condition of the bond quoted above.

Now, it is true that no breach was assigned in the declaration alleging a failure by McArthur to deposit public funds in the sub-treasury, because the breaches were more radical, so to say, and consisted in conversion and a failure to account ; but when a set-off was claimed under the seventh plea of the sureties for the money deposited

in the Cook County National Bank and thereby lost, and issue was joined on that plea, it became proper for the court to charge the jury that such deposit was unlawful and could not constitute a valid set-off.

Was the fund deposited in the Cook County National Bank a valid credit or set-off for McArthur to the full amount thereof which remains unpaid?

The counsel for plaintiffs in error has so framed his assignment of error upon the charge of the court in respect to the credit to be allowed for the bank deposit as to concede by implication that McArthur and his sureties were not entitled to a credit for the full amount of the unpaid deposit. Nevertheless, in the argument upon the issues of fact (Brief, pages 35, 36, 37) he seems to contend that they were. It is thought proper, therefore, before considering the assignments of error, as set forth on page 23 of plaintiffs' brief, to discuss the question above stated.

It is to be first observed that the claim of a full credit for the bank deposit, to be sustained, must be based upon one of two grounds: Either that the failure of the bank was an excuse for loss of the funds by the postmaster, or that a deposit with the bank was in fact a payment to an authorized agent of the United States. If the bank were of good financial repute, and the postmaster were an ordinary trustee, having trust funds, charged only with the exercise of ordinary care, the failure of the bank would be a good excuse for non-payment. But it is settled in this court by a number of decisions that, on grounds of public policy and

the letter of the bond, the obligation of a postmaster or other public official in charge of public money, is much higher than that of ordinary care, is analogous to the obligation of a common carrier with respect to goods, and is in fact an insurance against every loss except such as occurs by act of God or the public enemies. (*United States* v. *Thomas*, 15 Wallace, 337; *United States* v. *Prescott*, 3 Howard, 578.)

A failure of a reputable bank comes under neither exception. It follows, then, that even if McArthur was not acting unlawfully or negligently in making the deposit which he did make in the Cook County National Bank, yet he is still liable to the Government for the money lost thereby, unless it is true that when he made the deposit the money by law was left with the bank at the risk of the Government; that is to say, unless it appears that in the case of that particular deposit the bank was the agent of the Government to receive it.

The Cook County National Bank was a depository designated by the Secretary of the Treasury to receive public moneys, under section 5153, Revised Statutes. That section provides that national banks designated as depositories shall be such, under the regulations of the Secretary of the Treasury, and that he shall require them to give satisfactory security by the deposit of United States bonds, or otherwise for the safe-keeping and prompt payment of the public money deposited with them. It is manifest that the intention of the law is that the Secretary of the Treasury shall regulate the amount of deposits at each public depository, or at least shall have

some means of knowing what the amount is to be, so as to fix the security required. The mere fact, then, that a bank happens to be a public depository is not *ipso facto* an invitation and direction to any public official having public moneys to deposit them there in his own name at the risk of the Government.

By section 3848 the postmasters at cities having assistant treasurers are directed to deposit postal revenues and all money accruing at their offices with such assistant treasurer at least once a week.

By section 3620 every disbursing officer having any public money intrusted to him for disbursement is required to deposit the same with the treasurer, or an assistant treasurer, and to draw for the same as he needs it for payments according to law. Where there is no assistant treasurer he may use a designated depository if such deposits are specially authorized in writing by the Secretary of the Treasury.

By section 4046 a postmaster is authorized, when directed by the Postmaster-General, to deposit in a national bank designated as a public depository, to his own credit as postmaster, money-order or other funds in his charge.

By section 3847 a postmaster in a county where there is neither designated depository nor assistant treasurer, may deposit public money belonging to the Government, at his own risk, in his official capacity, in any national bank in the town where he lives.

It would seem to follow from these sections that in a city where there is an assistant treasurer the postmaster must deposit all moneys coming from his office, which he

deposits at all, with such officer. But even if, by direction of the Postmaster-General, he would be authorized to make deposits in his own name under section 4046 in a designated depository, it must be that, without such direction, deposits by him would be unauthorized and at his own risk. In the case at bar, the letter of June 14, 1873, to McArthur from the Third Assistant Postmaster-General, was an express direction to make daily deposits with the assistant treasurer, and to reserve only enough for current expenses. This was an abrogation of any previous authority to make deposits at the Cook County National Bank.

The direction to reserve enough for current expenses, meant to safely keep for current disbursements, and was not an authority to deposit anywhere. The direction was to deposit the "proceeds of his office." That included money-order funds as well as postal receipts, for section 4045 declares money-order funds to be money in the Treasury of the United States, and makes it the duty of the assistant treasurer of the United States to open, at the request of the Postmaster-General, an account of money-order funds deposited by postmasters to the credit of the Postmaster-General. When, then, McArthur continued his deposits at the Cook County National Bank he had no direction from the Postmaster-General which would entitle him to regard such deposits as at the risk of the Government.

There were some averments in the pleadings, and perhaps in the claim for credits and set-offs, that these deposits were continued with the knowledge of the Postmaster-

General; but there was no evidence of that kind. As these deposits were to the credit of the postmaster, there is no presumption that he knew it. The fact that the security deposit of bonds was only large enough to cover the internal-revenue money would seem to evidence the contrary. It follows from what has been said that loss from a failure of the bank must fall on McArthur, and a failure to make this loss good on demand was a breach of his bond.

Nor does the fact that the Government collected back part of these deposits out of the remainder of the proceeds of the United States bonds, after paying in full the internal-revenue collections, affect the question. There was no doubt that these deposits were public money. The United States had the right, therefore, to follow them wherever it could, and to use such security as it had against the Cook County National Bank to make good the loss. But recognition of the deposits as public money by a partial collection of them as such, is not an approval of the unauthorized deposit, or a waiver of the right of the Government to look to its agent for re-imbursement for the loss for which he was responsible in making such deposit. The case of *Cook County National Bank vs. United States*, 107 U. S. 445, has no bearing upon the question of the liability for these deposits as between the Government and the postmaster, but only as between the Government and the bank.

FIRST ASSIGNMENT OF ERROR.

It is claimed under this assignment that the court erred in directing the jury not to allow a credit in fixing damages of any of the proceeds of the bonds deposited by the Cook County National Bank beyond the sums credited in the statements of the Sixth Auditor, introduced in evidence. As a matter of fact, the proceeds of these bonds were used to pay back the internal revenue collections in full, and only what was left was applied to pay the postmaster's deposits. The bank dividends were credited on the judgment.

The argument is that the internal revenue collector and his sureties were liable to the Government for his deposits lost in the bank, and conceding that the postmaster and his sureties were also liable for his deposits so lost, there was by the sale of the United States bonds a payment of $174,582.02 to make good the losses for the benefit of the sureties on both bonds, which payment on equitable principles must be distributed to benefit the sureties in proportion to the loss under each bond. If that course had been followed by the Secretary of the Treasury in his distribution, the credit to McArthur would have reduced the recovery in this case nearly $24,000. Counsel supports the principle of the equitable *pro rata* distribution between sureties on different bonds by abundant authority.

The force of these authorities is fully admitted, but it is submitted, with deference to counsel, that neither the principle nor the authorities have any application to the

facts as presented here. The foundation of the argument is that the internal revenue collector and his sureties were liable on his bond to the Government for the loss of the deposits made by him, whereas in fact there was no such liability. By section 3210 it is provided that the gross amount of all internal revenue collections, from whatever source, shall be deposited daily in the treasury of the United States without any abatement or deduction on account of salary or expenses of collection, and a certificate of such deposit signed by the depository, or an officer thereof, shall be transmitted to the Commissioner of Internal Revenue.

By section 3211 the Secretary of the Treasury is authorized to designate one or more depositories in each State for the deposit and safe-keeping of the money collected by virtue of the internal revenue laws; and the receipt of the proper officer of such depository to a collector for money deposited by him shall be a sufficient voucher for such collector in the settlement of his accounts at the Treasury Department. Now the Cook County National Bank was a depository designated by the Secretary of the Treasury. The revenue collector deposited his collections there, and each day a certificate of such deposit was forwarded to the Commissioner of Internal Revenue. Can there be any doubt that the bank was designated by the Secretary as the place for internal-revenue collections? Is there not in the absence of evidence a presumption that the collector was acting by direction of his superior officer and within the law? The fact that the security taken was just a little more than enough to cover the internal revenue collections al-

lowed to remain on deposit is evidence that it was with a view to such collections that the security was fixed. Counsel for plaintiffs in error says in his brief (page 41): "It was as much the duty of the collector of internal revenue to deposit his funds with the assistant treasurer in Chicago as it was the duty of the postmaster to deposit his." Where is the authority in the statutes for such a claim? The only provision for the deposit of internal revenue collections is in sections 3210 and 3211, where the entire discretion to say where they shall be deposited is vested in the Secretary of the Treasury, while, by section 3848, postmasters in cities where there is an assistant treasurer are required to deposit with him, and no discretion to otherwise direct is vested in the Postmaster-General; and, moreover, in this case McArthur had no direction to deposit elsewhere. Section 3620, as to disbursing officers and their obligation to deposit with assistant treasurers, has no application to internal revenue collectors, for they do not disburse any of their collections. They may be specially designated to act as disbursing agents, but when so designated they give a separate bond (sec. 3144, R. S.), and their deposits would not be as revenue collectors, but as disbursing agents. It follows from what has been said that the revenue collector, when he made his deposits in the Cook County National Bank and presumably received a certificate of such deposits, had turned his collections over to the United States and was relieved from further responsibility for them.

When the Secretary of the Treasury came to distribute the proceeds of the bonds, therefore, he found a legal deposit of public moneys in the bank for which he held

only the bonds as security, and an unauthorized deposit of public money for which the depositing official was liable on his bond to the Government. Was there any principle of equity requiring the Secretary to apply the proceeds *pro rata* between the legal and the unauthorized deposits so that the Government should lose part of the legal deposit to help the sureties on the bond of the official responsible for the deposit which was unauthorized? It is respectfully submitted that there was and is no such principle known to equity. The first assignment of error can not be maintained.

SECOND ASSIGNMENT OF ERROR.

It is claimed in this assignment that the circuit court erred in excluding from the jury all testimony relating to the claims of McArthur on his building contracts against the United States.

Part of this evidence was introduced to show that McArthur was entitled to damages by reason of delay on the part of the officers of the United States in furnishing other materials for those buildings. It was properly excluded, because if relevant at all, it was so only as a set-off against the United States. By virtue of sections 951 and 952, Revised Statutes, it was necessary, before it could be proven as a set-off, that the claim should have been presented to the Sixth Auditor and disallowed. No claim for damages for delay was ever presented to the Sixth Auditor by McArthur or his sureties. The sixth claim of credit or set-off in the application which was shown in this case (Record, p. 66) was for $5,000 due for work and

material furnished, but nothing is said of a claim for damages. Moreover, damages for delay would be unliquidated, and a claim for such damages is not a proper subject of set-off against the United States. (*United States* vs. *Buchanan*, 8 Howard, 83.)

The evidence with respect to the work and material on these contracts the court first admitted, and then excluded, without stating a reason. The evidence of the presentation of the claim for credit on account of this work, a fact indispensable to the right of defendants to prove the credit, consisted in the production of what purported to be (1) a letter from Alston's attorneys to the Sixth Auditor; (2) a written statement of claim sworn to by Alston, and (3) a letter from McGrew, the Sixth Auditor. (Record, pp. 65, 66, and 67.)

The bill of exceptions discloses no evidence tending to show that these letters were signed by the parties whose names were appended, or that they were actually sent or received. But if such proof is to be presumed from their original admission, even though they were finally excluded by the court (Record, page 68, par. 162), it would seem that the rejection of the claim ought to have been proven by a certified transcript from the records of the Sixth Auditor's Office, showing his official action in the premises. In the case of *United States* vs. *Gilmore* (7 Wallace, 491) it was held that where the law required the rejection of a claim by the Auditor and the Comptroller, parol evidence of such rejection was inadmissible, and that evidence from the books of the Treasury of the action of the officers was indispensable.

But whether these objections to the competency of the evidence be well taken or not, it is clear that if all the evidence offered did not justify a set-off, it was proper for the court to exclude it from the consideration of the jury.

This is the claim of the United States, and it will be considered in the discussion of the next assignment of error.

THIRD ASSIGNMENT OF ERROR.

It is contended by the plaintiffs in error, under this assignment, that the circuit court erred in directing the jury to allow nothing in the way of credits on account of work done and material furnished on these building contracts. The plea of set-off was raised in the seventh plea of the sureties. As between the United States and McArthur, on the issues of fact tried, there was no plea of set-off. The statement in the brief for plaintiffs in error that McArthur's twelfth plea was a plea of set-off, is a mistake. The plea of set-off relied on by counsel as the twelfth plea was in fact the thirteenth plea (Record, pages 11 and 12) to which a demurrer was filed and sustained (Record, page 48).

The twelfth plea begins in paragraph 24, page 11, of the record and ends in paragraph 25 on the same page, and is merely an averment that all the money demanded and not paid (except $34,824.04), as stated in the fifth assignment of breach, was and is in the Treasury of the United States. The case is to be considered, then, as one where the principal has not pleaded a set-off, but the sureties have.

The contention for the defendant in error is that in this action the sureties of McArthur could not set off against the United States the claim on the building contracts, because the right and title to that claim passed by operation of law to Ray, McArthur's assignee in bankruptcy, on the 27th day of February, 1877, some eleven days before McArthur left office. The breaches of the bond upon which recovery was had in this case were a failure by McArthur to pay drafts of the Postmaster-General upon him, presented in June, 1877, and March, 1880 (Record, pages 60 and 61). Any presumption of conversion arising from failure to pay those drafts does not carry the date of such conversion back of the last day of his term as postmaster.

Before the cause of action in this case arose, *i. e.*, before the bond became absolute, the claim for the balance on these contracts therefore had passed to the assignee for the equal benefit of McArthur's general creditors. When the transfer took place the United States had no lien upon the balance to secure the future contingent indebtedness of McArthur on his official bond. How then can the sureties appropriate to themselves the entire beneficial interest in these building contracts by setting them off against the debt on the bond, when the assignee holds them for the benefit of McArthur's general creditors?

It may be conceded under the case of *Watkins* **vs.** *United States* (9 Wallace, 764) that whether the claim for a set-off be legal or equitable, the presentation to and the rejection of the claim by the Sixth Auditor makes it a good defense to an action at law. And it may be further conceded that in equity, in the case of the insolvency of the

principal, sureties may compel him to set-off any claim he may have against the creditor (*Gillespie* vs. *Torrance*, 25 N. Y., 306.) But such equity can not arise and be asserted when, before suit brought, the claim sought to be set off has passed from the principal and beyond his control.

If it is argued that the United States, being the creditors of the bankrupt, had the right under section 5073 to treat the balance on the contracts and the debt on the bond as mutual credits, and so was under obligation to the sureties to reduce the debt on the bond by appropriating the balance due from it as a partial payment on the bond, there are two answers to the argument.

In the first place, the fact that the assignee in bankruptcy became the owner of the contracts before any of the breaches of the bond assigned in this case occurred, prevents the balance due by the Government on the contracts, and the debt due from McArthur on the bond, from being mutual credits, as between the United States and the assignee in bankruptcy.

This is a different case from either *Carr* vs. *Hamilton* (129 U. S., 252), or *Scammon* vs. *Kimball assignee* (92 U. S., 362). In the former the interest in the life-insurance policy had a present ascertainable value when the assignment of the insuring company took place, and in the latter the loss under the fire-insurance policy had occurred when the company failed, so that in each case there was a real debt though not due. In this case when the bankruptcy took place, the interest of the United States in the bond had no present ascertainable value, the debt was wholly contingent and the contingency did not happen until some

time after the interest in the contracts had fully vested in the assignee.

In the second place, if these two debts were mutual credits, there was no obligation resting on the United States, when the owner of the contracts was not a party to the case insisting on a set-off, to allow the same. It owed no such duty to the sureties. In *Hunter* vs. *The United States* (5 Peters, 187), where the question was between the United States and the sureties on a customs bond, it was held, that the payment by the United States to the assignee of the insolvent principal of money due on a transaction distinct from the bond, was not a violation of the creditor's implied contract with the sureties and did not release them. (See *Glazier* vs. *Douglass*, 32 Conn., 393; *Martin* vs. *Mechanic Bank*, 6 Harr. and Johns. (Md.) 235; *Perrine* vs. *Fireman's Ins. Co.*, 22 Ala., 577.)

The principle of these decisions is that the implied obligation of the creditor to part with no security for the payment of the debt, relates only to the release of something in the nature of a mortgage, pledge, or lien to which the surety, if he pay the debt, can be subrogated and that the mere naked right of set-off is not of that character.

Moreover, how can the United States be compelled to allow a set-off of a claim owned by the assignee when he is not a party? Would it not expose the Government to the risk of a suit for the payment of the balance by the assignee? If such a set-off can be allowed, it seems clear that it can only be in an action in equity where all persons claiming an interest in the contracts must be made parties. It is submitted that the general right to prove equitable set-offs, for which credit, under section 951, Revised Stat-

utes, has been applied for to the Sixth Auditor, against the United States in actions at law, can not extend to cases where the presence of third parties is necessary to the allowance of such set-offs, because in actions at law the procedure will not permit the presence of such parties. If the sureties could not bring the United States as a defendant into a court of equity, then they are at the disadvantage of many another suitor, but they can not plead such disadvantage as a reason for depriving the assignee of any rights he may have or assert in the building contracts without giving him his day in court. If the United States, as against the assignee in bankruptcy, has a priority in the distribution of McArthur's assets, under sections 3466 and 5101, Revised Statutes, then the sureties, by paying the bond-debt, will be subrogated to that priority under section 3468, and so will not be without a remedy.

FOURTH ASSIGNMENT OF ERROR.

Under this assignment it is complained that the admission by the circuit court of the transcript from the Sixth Auditor's money-order account books, made in March, 1880, was error. The transcript made in November, 1877, some eight months after McArthur left the office, showed a balance due from him to the Government of $8,244.07. No objection was made to the introduction of this transcript. The further transcript of March, 1880, contained an additional item, the entry of which was as follows:

> To amount improperly claimed by John McArthur on account of money-orders alleged to have been paid, which amount has been transferred to the credit of F. W. Palmer, P. M., Chicago, Ill., $14,865.91.

This made the balance due from McArthur, on money-order account, $23,109.98, instead of $8,244.07, as given in the first transcript. The additional item was objected to because it was entered after the commencement of the suit, because it was a transfer from the account of McArthur's successor, because it was made without any notice to McArthur, and without any evidence of liability being furnished, and because the Auditor could not change the account and thereby increase the liability of defendants after the court had acquired jurisdiction of the subject-matter of the suit so as to make the Auditor's action evidence against them, or any of them. (Record, page 60.)

The objections to the transcript containing the item of March 10, 1880, were properly overruled. Section 889, Revised States, provides that—

> Copies of quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor and transcripts from the money-order account books of the Post-Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account certified as aforesaid shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

There can be no doubt that the transcript of the account, admission of which is complained of (Record, page 59), comes within the letter of the foregoing section.

Plaintiffs in error seek to have implied in the section

several exceptions; first, that all entries on the books so transcribed must have been made before suit is brought; and, second, that the delinquent should have notice of the entries.

This and similar sections of the Revised Statutes are an alteration of the established laws of evidence for the convenience of the Government in suits against delinquent public officers (*United States* vs. *Pinson*, 102 U. S., 554). The theory upon which such provisions are based must be that the officers in charge of the Government books do their duty in making the true and proper entries of the transactions which it is their duty to record and information of which reaches them in the regular and ordinary channels.

If the statute is founded on a presumption of a proper discharge of official duty, no reason is apparent why such presumption does not arise with reference to entries of transactions subsequent to suit brought as well as to entries of those which occurred prior to that time. The Auditor of the Treasury does not stand in the same relation to the Government that the book-keeper does to a private litigant who is his employer.

By section 277, Revised Statutes, it is made the duty of the Sixth Auditor to receive all accounts arising in the Post-Office Department, or relative thereto, with the vouchers necessary to a correct adjustment thereof, and to audit and settle the same and certify the balances thereon to the Postmaster-General, to keep and preserve all accounts and vouchers after settlement, to report to the Postmaster-General all delinquencies of postmasters in rendering their accounts and returns or in paying over money-

order funds and other receipts at their offices. The Auditor occupies a position more or less of indifference between the Government and the official whose accounts he examines, and is in a sense an arbitrator. By section 270, if the Postmaster-General is dissatisfied with the settlement of an account by the Sixth Auditor, he may appeal within twelve months to the Comptroller of the Treasury, whose decision shall be conclusive. It would seem to follow from this that in keeping and settling accounts the Auditor acts in a quasi-judicial capacity, and that entries made by him and accounts settled would not be open to the suspicion of being influenced by pending litigation, such as might justly arise in the case of entries made by a mere book-keeping agent of a private litigant.

The entry, admission of which is complained of here, was, from its legend, evidently a total of entries made on the money-order account of Palmer, McArthur's successor as postmaster. These were entries of payments by Palmer of money-orders which McArthur had falsely returned as paid and received credit for in his account. Such payments by Palmer were exactly the items which it was the official duty of the Auditor to record in his money-order account. With respect to these payments he had just that kind of official knowledge upon which was based every entry made in the money-order accounts. That is to say, it was a knowledge derived through the regular channels from ordinary official sources. Having found then that Palmer was making payments on money-order accounts for which McArthur had already falsely taken credit, the necessary and proper book-keeping entry was to debit McArthur's account with the sum of the pay-

ments with which it became necessary to credit Palmer's. It was the Auditor's duty to do this whether a suit was pending or not.

It would be going very far to say that McArthur, by rendering a false statement of account, could prevent the Government from correcting it by entries of subsequent transactions in the ordinary course of business showing the fraud, and from using that corrected account in evidence against McArthur. This would seem to be allowing him to profit by his own fraud. Yet this is what the contention of plaintiffs in error, with respect to the item of $14,865.91, comes to when subjected to investigation.

The objection that the item was incompetent because made after suit brought is presented in another way by plaintiffs in error, by saying that the subject-matter was then within the jurisdiction of the court, and it was therefore beyond the power of the Auditor to change it. It is hard to see how the bringing of a suit can affect the obligation of the Auditor to keep his books straight, and to make such corrections in them as subsequent transactions require. It is the condition of the books at the time of trial that is important. If money had been paid to the credit of the delinquent officer after suit brought, it is very clear that it would be the duty of the Auditor to credit such payment, and that it would be a proper item of the account to be certified by him.

In *United States* vs. *Eckford's Executors* (1 Howard, 592) the first transcript from the Treasury books of the account of a delinquent revenue collector showed a balance in favor of the collector, which arose by his being credited in one term of his office with payments made during a subse-

quent term, and the United States was allowed to introduce a transcript of the account, amended for the purposes of the case, in which the items were so transposed as to show the credit items to which he was entitled in the term of the office for which the bond was given. It was there contended that the duties of the Treasury officials with respect to the accounts being judicial, the settlement of an account was conclusive against the Government, and could only be opened for correction by a suit in court. This is analogous to the argument made here, that the account passed from the jurisdiction of the Auditor after suit brought, and thereafter changes could only be made by the court on evidence adduced under the ordinary rules prevailing in courts of law. But this court refused to so hold in the case cited, and permitted an amended account to be introduced in evidence.

In *Soule* vs. *United States* (100 U. S., 8) it was held that it was as competent for the accounting officers of the Government to correct mistakes and restate the balances as it was for a judge to change his decree during the term in which it was entered.

The case of *Ex parte Randolph* (2 Brock., 447) presented a very different case from the one at bar. There a warrant of distress had issued on a deficit found by the accounting officer of the Navy Department against an officer in the Navy who had settled his accounts with the accounting official and received a certificate thereof. It was held that a statute providing for such a summary process must be strictly construed, and that for the purposes of issuing such a warrant, in making one settlement the accounting official became *functus officio*, and could

not amend the balance so as to justify process upon a new settlement. Here no process issued on the changed balance; it was only a question of rebuttable evidence.

No objection was made at the trial to the fact that this entry was not itemized, and was a total of smaller items. The item was not a naked balance within the prohibition of the case of *United States* vs. *Jones* (8 Peters, 383), because it shows the smaller items from which it was made up, and could not be more specific without an interminable list of money-orders of small amounts necessary to reach such a large sum. This circumstance justified the use of the single item in the exercise of the discretion reposed in accounting-officers in stating such an account. (*Hoyt* vs. *United States*, 10 Howard, 134; *Gratiot* vs. *United States*, 15 Peters, 370.) If objection had been made, it would have been in the power of the Government to have produced a full itemized statement. In the absence of an objection of this kind, defendants below must be taken to have waived it. In *Hoyt* vs. *The United States* (10 Howard, 109), it was held no objection to a transcript from the Treasury books of an account with a collector of customs that it contains charges which were aggregates of items rendered by the collector in his quarterly abtracts, references to those abstracts being made and they not having been called for at the trial. In the item under discussion the reference made is to Palmer's money-order account, which, if it had been called for, would have shown the items whose total is given in the account introduced.

No objection was made at the trial that vouchers were not introduced in the shape of certified copies of the

money-orders which Palmer paid, and which McArthur had taken credit for. This objection is now made for the first time. If it had been made at the trial, vouchers might have been sent for. Reliance is had, in urging this objection, upon the case of *United States* vs. *Jones* (8 Peters, 388) in which it was held necessary for the United States in order to sustain any account containing items of payments made to others on the authority of the person charged, to have annexed to the account a duly-certified copy of the instrument which authorized these payments, because the execution of such instruments could not be officially known to the accounting officers.

Bills of exchange and orders upon the Treasury, drawn by a contractor for army supplies in favor of a third person, might well be beyond the official knowledge of the Auditor of the Treasury, but they are very different from post-office money-orders, which are in effect bills of exchange issued by the Government and signed by an authorized officer, accounts of the issuance of which as well as of the payment of which are regularly sent to the Sixth Auditor by the postmasters of the country. The payment of a money-order by Palmer was not a payment made to another on the authority of McArthur, but it was a payment on a regular Government warrant for such payment.

In the case of *United States* v. *Buford* (3 Peters, 25) it was attempted to show by the transcript of an account from the Treasury books the transfer of a balance of indebtedness from one public officer's account to that of another on the basis of a private transaction between them not authorized by statute, and it was held not ad-

missible. This case and that of *United States* v. *Jones*, *supra*, have been considered in *United States* v. *Hodge* (13 Howard, 478) and their effect given in the words of Mr. Justice Daniel as follows:

> The competency of a statement by the Auditor of all or any accounts with postmasters and contractors in suits against them, can not then be questioned; the accuracy of such statements as to detail is a wholly different matter and is to be questioned or contested in the mode prescribed by other provisions of the statute. The only qualification ever made of the principle above laid down, if indeed it can be properly considered a qualification, is to be found in the decisions of this court in the cases of *The United States* v. *Buford* (3 Pet., 29) and of *The United States* v. *Jones* (8 Pet., 375) in which it has been ruled that transcripts from the Treasury should not amount to proof of facts not coming within the regular relation existing between the Department and persons with respect to whom such facts may have transpired; but this exception or qualification can not apply to transactions falling strictly within the relation subsisting between the Government and its agents, or rather it goes to affirm the operation of the statute in reference to such transactions.
>
> The utmost latitude which could be given to the decisions above mentioned could not extend them to the entire character of the transcripts certified from the Department as evidence, but must limit their effect to any portions or items of those transcripts which should be irregular and not within the language or import of the statute, nor within the regular operations of the Department.

It is evident from this that the Sixth Auditor may be

said to officially know everything which comes to him of the accounts of Government officers through regular channels from official sources.

The contention of the counsel for plaintiffs in error amounts ultimately to a claim that the account of the Auditor proves nothing more than payments which he himself makes. As a matter of fact, the Auditor probably never sees a payment made, and he has as satisfactory offical knowledge in the shape of reports and vouchers of a payment of a money-order in Chicago as of a warrant in another room in the Treasury Department. It is clear that payments of money-orders in regular course at Chicago are as much "transactions falling strictly within the relation subsisting between the Government and its agents" as any that are recorded by the Sixth Auditor.

Nor is the objection to the competency of the transcript, which is based on the ground that McArthur had no notice of the correction of the account, of any weight. Notice was given to McArthur and his sureties of the large increase in the deficit on money-order account by the demand for the payment, which was mailed to them February 13, 1880 (Record, page 61). McArthur denies receiving the demand, but the sureties do not. Moreover, as early as May 31, 1880 (Record, page 51), the United States amended its declaration and increased the money-order deficit therein alleged from $8,244.07 to $23,513.51 to correspond with the amended account. Of this amendment the defendants were all chargeable with notice, and they might then have made demands for credits and correction under sections 951 and 952.

But whether notice was duly given of the correction or not is immaterial, because the competency of transcripts of Government accounts is not made to depend by the statute upon the fact that the delinquent officer has notice of them. (*Watkins* v. *The United States*, 9 Wallace, 759.)

On the whole, then, it is contended that the supplemental transcript of February, 1880, was admissible; that it disclosed an account which it was the Auditor's duty to keep; that the items enabling him to make it, reached him through the regular and ordinary channels from official sources; that neither vouchers nor items were necessary unless demanded; that notice to the delinquent was not required to make the change, and that the correction of an error and restatement of the balance was not beyond his power. It is respectfully submitted that this assignment of error can not be sustained.

FIFTH ASSIGNMENT OF ERROR.

The error here assigned is that the court excluded from the consideration of the jury the letter dated April 25, 1877, sent by McArthur to F. W. Palmer, in answer to the demand of Palmer for the payment of postal funds, on the order of the Postmaster-General. Palmer had testified to receiving no answer to his demand.

The letter of McArthur which was excluded denied the correctness of the amount so claimed to be due, and asserted claims to set-offs for money deposited in the Cook County National Bank at the time of its suspension, and for money due on building contracts entered into and performed by McArthur with and for the Government. If

the introduction of the letter of April 20, 1877, mailed to McArthur, had been for the purpose of proving an admission by McArthur, by his silence and failure to answer, of the correctness of the claim made in full, his answer would doubtless have been competent to rebut the inference of such admission. But Palmer's letter was not for that purpose, but was only introduced as a demand from which interest would begin to run on the amount claimed, and as the basis of a claim for a breach. As affecting that purpose the answer of Palmer, if in fact the amount was lawfully due as claimed, is wholly immaterial.

If it be argued that, whatever the purpose of Palmer's evidence, the fact of no answer by McArthur as testified to by Palmer had the evidential effect of showing an admission of indebtedness which McArthur was entitled to rebut, then it may be replied that the exclusion of the letter, even if erroneous, worked no prejudice. The only possible evidential weight of the letter would be to corroborate the claims of set-offs as actually made, by showing that they were not of recent origin, but had been made from the beginning of the controversy. If, however, admitting the *bona fides* of the claims of set-off, and all the facts adduced in support of them, they are not sufficient in law, as found by the court below, and as is now contended by the United States, to entitle defendants to a set-off, it can not be that the rejection of simple corroborative evidence on that issue worked any prejudice. If it is claimed that the denial of the correctness of the entire claim in McArthur's answer was more than an assertion of the right

to the set-offs, and was a dispute as to the claim aside from set-offs, the exclusion of the letter worked no prejudice, because the only substantive evidence of the amount of the deficiency on either side was the Auditor's accounts, and, in the absence of any direct evidence rebutting those accounts, it is not apparent what effect a mere self-serving assertion of their incorrectness by the delinquent postmaster, made out of court could have to rebut the *prima facie* case which the accounts made against him. In any light, therefore, defendants below did not suffer prejudice by the exclusion of the letter.

SIXTH ASSIGNMENT OF ERROR.

The last assignment of error is that the circuit court erred in rendering judgment for a greater sum than the amount claimed as damages in the summons and in permitting an amendment to the declaration fixing the *ad damnum* at a greater sum than claimed in the summons. The amount of the verdict was $116,559.14. There seems to have been an error of calculation in this which the district attorney corrected by remitting $7,910.64. The amount of damages laid in the declaration was $100,000. The declaration was filed in 1877, and if a verdict had been reached at any time within seven years the amount would have been sufficient, but by reason of the various continuances sometimes on the application of one side and sometimes of the other, it was nine years before a trial was had and the interest had then accumulated to such an amount as to exceed the *ad damnum*.

It is claimed for the United States that the provision

for amendments in the statutes of Illinois which must govern in this case (*West* vs. *Smith* 101 U. S., 263) is ample to justify the action of the circuit court in amending the declaration after verdict to conform to it and to give judgment thereon.

The statute of amendments chapter 7, par. 1, Starr & Curtis, Revised Statutes of Illinois, 265, provides as follows:

> That the court in which an action is pending shall have power to permit amendments in any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just at any time before judgment rendered therein.

This was passed February 25, 1874, and went into force July 1, 1874. Paragraph 24 of the practice act of Illinois (Starr and Curtis's Annotated Statutes, 1787), passed February 22, 1872, and in force July 1, 1872, provides as follows:

> At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense. The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action.

The consideration mentioned above, namely, of the

accumulation of interest by delay, certainly made the present case one for the application of the discretion of the court to enlarge the amount laid for damages in the declaration. It could work no surprise to the defendants, for it involved nothing but the same claim which had been standing for eight years. It appears, with submission, to be the purest technicality for the defendants to complain of the amendment as allowed.

In *Tomlinson* vs. *Earnshaw* (112 Illinois, 311) it was held no error in a trial court to allow the *ad damnum* to be amended by increasing the amount after verdict. (See also *McCollum* vs. *Railroad Co.*, 94 Ill., 534; *Cogshall* vs. *Beesley*, 76 Ill., 445; *Railroad Co.* vs. *Lickiss*, 72 Ill., 521.)

The cases cited in the brief for counsel for plaintiffs in error were decided years before the two sections of the statutes quoted above were passed, and the principles therein announced are not now the law of Illinois.

In *Thompson* vs. *Sornberger* (78 Ill., 353) counsel relied upon the case of *Brown* vs. *Smith* (24 Ill., 196) to prevent an amendment of the declaration. *Brown* vs. *Smith* was a case where it was held error to permit an amendment after verdict increasing the *ad damnum* on an action on a penal bond, and where *Russell* vs. *Chicago* (22 Ill., 283) was followed. The supreme court of Illinois say with respect to the case as follows:

> *Brown et al.* vs. *Smith et al.* (24 Ill., 196), cited by appellant, is not in principle like this, *nor was the practice act in* 1860, *when that case was decided, so liberal in its provisions as the present statute.*

The statute permitting the amendments under which the cases relied on by counsel for plaintiffs in error were decided was passed in 1845, and is by no means so broad in its terms as the present statute (Gross's Revised Statutes Illinois, chap. 5, secs. 1–14.) As it is quite long, and *Tomlinson* vs. *Earnshaw (supra)* is an express authority in favor of the power of the amendment in this case it is not deemed necessary to give it *in extenso*. *Tomlinson* vs. *Earnshaw* can not be distinguished from the case at bar by any claim that the former was not an action on a penal bond. In *Fournier* v. *Faggott* (3 Scammon, 350), where the old rule was established forbidding amendments increasing the *ad damnum*, the judge delivering the opinion goes into quite an argument to show that the strictness with which the rule is enforced in actions of trespass and assumpsit, which sound purely in damages, must also be applied to actions in debt where the statute requires an assignment of breaches and the indorsement of damages on the writ. When, then, the rule is relaxed in actions sounding purely in damages, as in *Tomlinson* vs. *Earnshaw*, *a fortiori*, must it be relaxed in cases like the one at the bar.

The last point made by counsel under this assignment is a technicality even more technical than the one just considered. Even under the old statute of amendments a discrepancy between the writ and the declaration was immaterial. Advantage of it could not be taken on error unless complaint of it was made below. *Thompson* vs. *Turner* (22 Ill., 389). And in this case it is said that the variance could be corrected in a court of error.

The seventh assignment of error presents no more than what is included under the first six assignments.

It is respectfully submitted that the judgment of the circuit court should be affirmed.

WM. H. TAFT,
Solicitor-General.

17951——4

FILED
MAR 26 1890
JAMES H. MCKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLILE MASON AND JOHN ALSTON, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANT in error.

No. 214.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

CARLILE MASON AND JOHN ALSTON, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANT in error.
No. 214.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

ON THE FIRST ASSIGNMENT OF ERROR.

Even if the court shall be of opinion on the facts in this case under section 4046, Revised Statutes, that McArthur had authority to deposit money-order funds in the Cook County National Bank, the plaintiffs in error do not stand in any better condition thereby. The deposit of general postal funds was unauthorized under section

3848, Revised Statutes. The money-order funds on deposit, as shown by the ratio of the dividend payments on the two accounts (Record, 62), were considerably less than one-half of the whole amount on deposit, which was $39,584. The balance of the proceeds of the United States bonds sold by order of the Secretary of the Treasury, after paying the internal revenue deposits was $19,239.05. This would more than pay the money-order deposits. If those deposits were legal, it was the duty of the Secretary of the Treasury to pay them first and leave the unauthorized deposit of the general postal funds to be reduced by the small balance remaining. The act of the Secretary in making a different application, if the money-order deposit was authorized, would be illegal, and could not bind the Government. (*United States* v. *January*, 7 Cranch 572.)

ON THE THIRD ASSIGNMENT OF ERROR.

The plaintiffs in error, as sureties, sought to set off against the bond debt a claim which at one time belonged to their principal, but which, before the suit was brought, and, indeed, before the cause of action on the bond arose, had passed from the principal to his assignee in bankruptcy. The claim of the principal against the Government had no connection whatever with the debt on the bond. A surety has no right to appropriate to himself, without the consent of the principal, an independent claim of the principal against the creditor. In equity, however, the surety is permitted to bring the principal into court to compel him to exonerate the surety from the payment

of the debt, if the debt has fallen due. (*Wittridge* v. *Durkee*, 2 Md. Chan., 442; *Croone* vs. *Bivens*, 2 Head (Tenn.), 339; *Thigpen* v. *Price*, Phill. (N. C.), Eq., 146; *Stump* v. *Rogers*, 1 Ohio, 533; *Washington* v. *Tate*, 3 Humph. (Tenn.), 543; *Warner* v. *Hall*, 13 Vt., 81; *Hannay* v. *Pell*, 3 E. D. Smith, 432.)

In case of the insolvency of their principal, therefore, sureties may bring their principal and the creditor into a court of equity and compel the principal to allow the use of his claim against the creditor as a set-off. It is plain that in such an action the principal must be a party. This has been decided in a number of cases. (*Lasher* v. *Williamson*, 55 N. Y., 619; *Springer* v. *Dwyer*, 50 N. Y., 19; *Gillespie* v. *Torrance*, 25 N. Y., 306; *LaFarge* v. *Halsey*, 1 Bosworth, 171; *Winston* v. *Metcalf*, 6 Ala., 760; *Graff* v. *Kuhn*, 18 Bradwell (Ill. Ap.), 485; *B. & O. R. R. Co.* v. *Bitner*, 15 W. Va., 455.)

In *Gillespie* v. *Torrance* (25 N. Y., 306), where the action was against an accommodation indorser who sought to set off a counter-claim of the principal maker, who was not a party, it was said by the court:

> In the case which was shown on the trial there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced by applying toward its satisfaction the damages which appear to be due to Van Pelt [the principal in the note] for the breach of warranty. It is, however, an equity in which Van Pelt is interested to as great, and possibly to a greater extent than the defendant, and can not be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected.

In all the cases cited, it is pointed out that to allow the surety in the absence of the principal to try the question how much is due the principal on his claim against the creditor, would lead to obvious injustice and absurdity. The principal could not be bound by an adjudication upon his claim to which he was not a party, and the creditor ought not to be subjected to a second suit by the principal on the claim. These objections apply with equal force to the claim of the sureties to the set-off in the case under discussion, for while the principal is here a party, he is not the owner of the claim sought to be set off, and has not been since the bringing of the suit. The assignee in bankruptcy owns and holds the claim for the benefit of creditors. The amount of the claim has been adjusted by the Sixth Auditor of the Treasury, but such adjustment is not conclusive upon the assignee in bankruptcy, or upon the sureties in this case. Either may dispute it if parties to a controversy in which the claim is the subject of the action. Upon the plainest principles of justice, the assignee can not be concluded as to the amount of the claim by a litigation of it on the part of the sureties, to which he is not a party.

It could not affect the application of the principle here invoked by the sureties if the claim on the contracts exceeded the debt on the bond. In such a case no judgment could be rendered on the cross-claim against the Government, because there would be no party in whose favor it could be rendered. If it was only used for the purpose of defeating the claim of the Government, how could it be determined in a subsequent action by the assignee what remained of the claim to be paid to him? In seeking to

recover on the claim he would not be estopped by the adjudication upon the claim at the instance of the sureties. A procedure resulting in such confusion can not be sanctioned by the courts.

It is to be observed that the right of the surety to avail himself of the claim of the principal as a set-off, does not grow out of an obligation resting upon the creditor toward him. The right of the surety against the creditor is that he shall not release any security which he may have for the payment of the debt. The authorities already cited on page 24 of the brief for the United States show that an indebtedness from the creditor to the principal, independent of the surety debt, is not a security held by the creditor which he is bound to preserve for the benefit of the surety. If this court, however, should take a different view, and hold that such a cross-indebtedness from the creditor to the principal is in the nature of a security for the payment of the debt which the creditor is bound to preserve, as has been held in *Rubey* v. *Watson* (22 Mo.Ap., 428), it is clear upon authority that the surety is not entitled to avail himself of the security held by the creditor until he has paid the debt, (*Neptune Insurance Company* v. *Dorsey*, 3 Md. Chan., 334; *Swan* v. *Patterson*, 7 Md., 164; *Garnet* v. *Blodgett*, 39 N. H., 150); and he can not insist upon the creditor's exhausting his right against the principal, when a bankrupt, except upon the payment of the whole amount of the debt into court. *In re*, Babcock, 3 Story, 393.

It is apparent from what has been said that the right of the surety to set off a claim of the principal against the creditor, can not be worked out from any obligation of

the creditor, to the surety, but must depend wholly on the equitable right of the surety to call upon the principal to exonerate him from the payment of the debt. The result which follows from this has already been stated.

It is hardly necessary to cite authorities to show that by the assignment in bankruptcy the assignee took all the rights of McArthur. It may be noted, however, that this court has decided in *Erwin* v. *U. S.* (97 U. S., 392), and in the case of *Goodman* v. *Niblack* (102 U. S., 556), that the provision of the Revised Statutes, section 3477, forbidding transfers of claims against the Government, does not include the passing of claims to assignees in bankruptcy, or a voluntary assignment made by an insolvent debtor for the benefit of all of his creditors.

WM. H. TAFT,
Solicitor-General.

136-586 10.644

RECEIVED
MAR 10 1890
JAMES H. McKENNEY,
CLERK

PETITION.

IN THE 136-586.

SUPREME COURT

OF THE

UNITED STATES.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE IN PETITION FOR HABEAS CORPUS.

G. M. LAMBERTSON,
Attorney for Petitioner.

LINCOLN PAPER HOUSE, PRINTERS.

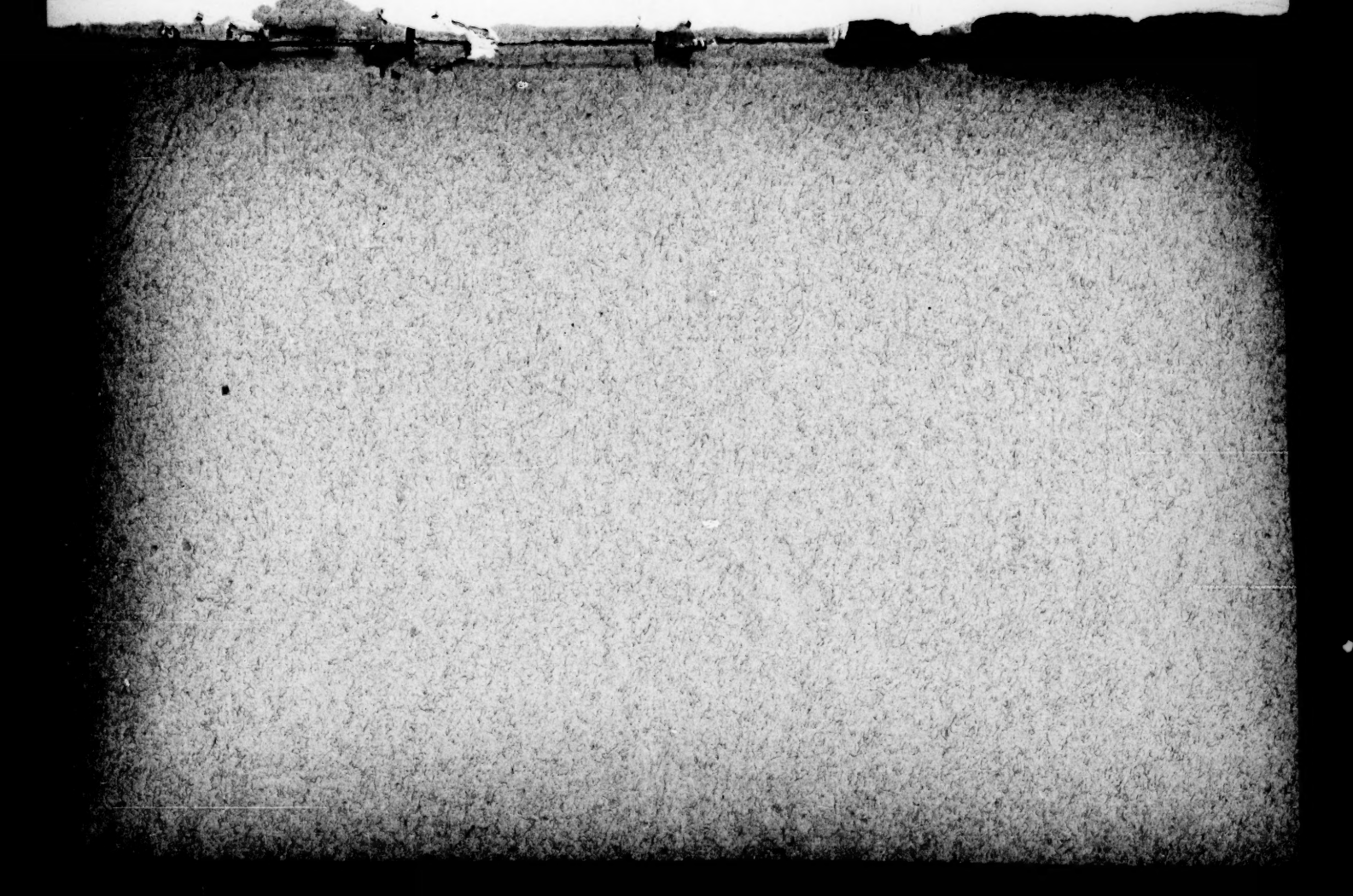
IN THE

Supreme Court of the United States.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE IN PETITION FOR HABEAS CORPUS.

The petitioner, Thomas F. Burrus, complainant, shows that he is unjustly and unlawfully detained and imprisoned by Brad. Slaughter, United States Marshal of the state of Nebraska, in the jail at Omaha, in the state of Nebraska, by virtue of an order of the District Court of the United States, issued under the following circumstances:

On the 23d day of April, A.D. 1889, one Lewis B. Miller, a resident of the town of Oxford, in the county of Butler, in the state of Ohio, filed a petition for a writ of habeas corpus addressed to the Honorable Elmer S. Dundy, District Judge of the United States for the district of Nebraska, alleging that he was engaged in agricultural pursuits, and is about thirty-seven years of age; that he was a married man, and that his wife, Lucretia B. Miller, to whom he was married in February, A.D. 1887, composed his immediate family. He further averred that his first wife died on the 17th day of May, 1882, leaving her surviving one child, Evaline E. Miller, who was born on the 7th day of October, A.D. 1881; that at the time of his wife's decease he was living in Nemaha County, in the state of Nebraska; that the child was left with your petitioner, Thomas F. Burrus, and his wife, Catharine Burrus, mother of the deceased wife; that the



IN THE

Supreme Court of the United States.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE IN PETITION FOR HABEAS CORPUS.

The petitioner, Thomas F. Burrus, complainant, shows that he is unjustly and unlawfully detained and imprisoned by Brad. Slaughter, United States Marshal of the state of Nebraska, in the jail at Omaha, in the state of Nebraska, by virtue of an order of the District Court of the United States, issued under the following circumstances:

On the 23d day of April, A.D. 1889, one Lewis B. Miller, a resident of the town of Oxford, in the county of Butler, in the state of Ohio, filed a petition for a writ of habeas corpus addressed to the Honorable Elmer S. Dundy, District Judge of the United States for the district of Nebraska, alleging that he was engaged in agricultural pursuits, and is about thirty-seven years of age; that he was a married man, and that his wife, Lucretia B. Miller, to whom he was married in February, A.D. 1887, composed his immediate family. He further averred that his first wife died on the 17th day of May, 1882, leaving her surviving one child, Evaline E. Miller, who was born on the 7th day of October, A.D. 1881; that at the time of his wife's decease he was living in Nemaha County, in the state of Nebraska; that the child was left with your petitioner, Thomas F. Burrus, and his wife, Catharine Burrus, mother of the deceased wife; that the

child was only left temporarily with the grandparents, and that said Miller had not surrendered his right to the custody, maintenance, education, and control of the child. Said Lewis B. Miller further averred that he had demanded the child from the said Thomas F. Burrus and his wife, and that each of them had refused to give up said child to your petitioner.

A copy of said petition is hereto attached and marked exhibit "A."

The petition of said Lewis B. Miller concluded with the prayer that a writ of habeas corpus be issued, and that the said Thomas F. Burrus and Catharine Burrus be ordered to produce on a certain day and at a certain place, to be named by the District Judge, the said Evaline Miller, and that the said Evaline Miller be delivered to the said Lewis B. Miller.

Your petitioner further shows that after the service of the writ he made a return to the same, and represented to the Court that the said Lewis B. Miller had delivered the custody of the child, Evaline Miller, to the said Thomas F. Burrus and Catharine Burrus, on or about the 7th day of October, A.D. 1881, on the day of the death of the mother of the child; that the child had remained with the grandparents ever since that time, who had nursed, clothed, fed, provided for it, and had educated it as faithfully and affectionately as if it were their own child. That since the death of the mother of the child the said Lewis B. Miller had not contributed anything towards the support, care, and maintenance of it, and had not exhibited any affection or interest in it, but, in fact, by his conduct had abandoned all claim or right to its custody, maintenance, and education.

A copy of said answer is hereto attached and marked exhibit "B," and made a part of this petition.

Said cause came on for hearing at the May, A.D. 1889, term of the District Court of the United States for the District of Nebraska, and was heard as though the application had been made to the District Court, and the said District Court, after hearing all the testimony on behalf of the relator and the respondents, adjudged that the child, Evaline Miller, be delivered to the custody of the said Lewis B. Miller, and that your petitioner, Thomas F. Burrus, and his wife, be enjoined from interfering with the custody of the said Lewis B. Miller to the child; but said judgment was stayed, pending an appeal to the Circuit Court of the United States for the District of Nebraska, on the condition the said Thomas F. Burrus and Catherine Burrus would execute a bond in the sum of $1,000, conditioned that they would produce the child before the Circuit Court at the next November term thereof, there to abide final judgment and order of the Court. A copy of the judgment marked exhibit "C" is hereto attached. Subsequently a transcript of the proceedings in the District Court, together with the testimony, was duly docketed in the Circuit Court of the United States for the District of Nebraska, and a hearing was had before the Honorable David J. Brewer, Judge of said Circuit Court, on a motion to dismiss the appeal, on the ground that no appeal would lie; and the Circuit Judge, being duly advised in the premises, sustained said motion and dismissed the appeal for the reason that an appeal would not lie, except in the case of a person alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States.

Subsequently, during the November term of the said Dis-

trict Court, A.D. 1889, a motion was made to stay the execution of the order of delivery of the child, Evaline Miller, to said Lewis B. Miller, on the ground that the District Court was without jurisdiction of the case, it being nowhere alleged in the petition of the said Lewis B. Miller that the child, Evaline Miller, was in custody under or by color of the authority of the United States, or in custody for an act done or omitted in pursuance of the law of the United States, or of an order, process, or decree of the Court or Judge thereof, or in custody for the violation of the Constitution or of any law or treaty of the United States, or in custody under or by virtue of any authority recited in Section 753 of the Revised Statutes of the United States.

The District Court, after argument, overruled the motion and directed the marshal to deliver the child into the custody of the said Lewis B. Miller, which was done.

That after the marshal had delivered the child, Evaline Miller, into the custody of the said Lewis B. Miller, the said Lewis B. Miller permitted the said child to remain with your petitioner and his wife, Catherine Burrus, until such time as such Lewis B. Miller might take his departure to his home in the state of Ohio.

On account of the illness of the child, the said Lewis B. Miller was unable to leave the city of Omaha for his home for a few days.

Subsequently, by mutual agreement entered into between your petitioner and the said Lewis B. Miller, both the said Lewis B. Miller and this respondent and his wife, together with the child, took the Union Pacific dummy in the city of Omaha, Neb., for the transfer station in the city of

Council Bluffs in the state of Iowa, from which point your petitioner departed with the child for the town of Malvern in the state of Iowa, where he remained several days, and subsequently returned to his home in Nemaha County, Nebraska.

Your petitioner further represents to the Court that on the 31st day of January, A.D. 1890, a rule was issued out of the District Court of the United States, and duly served upon your petitioner, requiring him to appear on Monday, the 3d day of February, A.D. 1890, at 2 o'clock in the afternoon, before said Court at the United States Court room, in the city of Lincoln, Neb., and show cause why he should not be attached for contempt for violating a judgment entered in said cause, ordering the delivery of the child, Evaline Miller, to the custody of the said Lewis B. Miller; also, commanding the said Thomas F. Burrus to produce said child before the Court under the pains and penalties of the law.

Pursuant to said rule, said Thomas F. Burrus, your petitioner, appeared before the District Court on the 3d day of February, 1890, and, by way of answer, represented to the Court that the said writ had been satisfied by the delivery of the child to the said Lewis B. Miller; that he had been advised by counsel that the Court was without jurisdiction to make any of the orders and judgments in said habeas corpus proceedings, and he therefore suggested to the Court the total want of jurisdiction, either of respondent or the subject matter of the action, and declined to produce the child before the Court, whereupon the Court, having duly considered the answer and the return made to the rule, held the same insufficient, and on the 5th day of February, A.D. 1890, committed your petitioner to the custody of the United States marshal for the district of Nebraska and imprisoned

your petitioner in the county jail at Omaha, in the state of Nebraska, where your petitioner is now confined and restrained of his liberty.

Your petitioner claims that the District Court of the United States for the district of Nebraska had no jurisdiction of the habeas corpus proceedings instituted by Lewis B. Miller for the purpose of obtaining the custody of the child, Evaline Miller, and your petitioner alleges that the several judgments and orders of the Court in that proceeding were invalid, and the judgment of said Court that your petitioner was in contempt and that your petitioner should suffer imprisonment for violating the judgments and orders of the District Court in the premises is void and without the jurisdiction of the District Court of the United States and in violation of the Constitution and laws of the United States.

Your petitioner alleges, as special circumstances make direct action and intervention of this court necessary and expedient, that it would be useless to apply to the Circuit Court of the United States for the district of Nebraska for a writ of habeas corpus, because the District Judge has already given it as his opinion in the contempt proceedings that the said restraining order was a lawful order and within the power of the Court to make, and for the further reason that a vacancy exists in the judgeship for the eighth judicial circuit of the United States.

Wherefore your petitioner, to be relieved of said unlawful detention and imprisonment, prays that a writ of habeas corpus directed to the said Brad. Slaughter, United States Marshal for the district of Nebraska, may issue in his behalf, so that your petitioner may forthwith be brought before this Court and do, submit, and receive what the law may require.

UNITED STATES OF AMERICA, }
District of Nebraska. }

Thomas F. Burrus, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him, that he has read the same and knows the contents thereof, and the statements made therein are true.

THOMAS F. BURRUS.

Subscribed in my presence and sworn to before me this 10th day of February, A.D. 1890.

ELMER D. FRANK,
Clerk U. S. Circuit Court.

EXHIBIT A.

To the Honorable Elmer S. Dundy, District Judge of the United States for Nebraska:

The petition of Lewis B. Miller, of the town of Oxford, in the county of Butler, and state of Ohio, respectfully shows unto your Honor that the petitioner is a resident of Oxford, aforesaid, in the state of Ohio, and has been for the last past two years and longer; that he is engaged in agricultural pursuits, and is about thirty-seven years of age; that he is a married man, and that his wife, Lucretia B. Miller, to whom he was married in February, A.D. 1887, compose his immediate family at the present time.

That petitioner further shows unto your Honor that he was previously married, and that his first wife died on the 17th day of May, 1882, leaving her surviving one child, Evaline Estelle Miller, who was born on the 7th day of October, A.D. 1881.

That at the time of his wife's decease your petitioner was living in Nemaha County, in the state of Nebraska. That his first wife died of measles, and that at time of her death his child was also sick with the same disease.

That the child was ordered by physician to be removed from the house when his first wife was sick and dying, and that, in pursuance of said direction, the child was temporarily taken to the residence of her grandparents, Thomas F. Burrus and Catherine Burrus, his wife, who then were and now are residents of Nemaha County, aforesaid.

That the said child was only taken there temporarily, and that this petitioner did not then, nor has he at any time since, surrendered his right to the custody, maintenance, education, and control of his said child.

Your petitioner shows that since that time he has frequently demanded the said child from the said Thomas F. Burrus and Catherine Burrus, his wife, and that they and each of them have refused to give up said child to your petitioner or to his custody and control, and have frequently told your petitioner they did not mean to give her up, and that your petitioner should never have the said child, nor the custody, company, nor control of her until they were compelled to release her by law.

That during the time your petitioner was a widower they said he could never have the child until he had a wife or some one who could properly take care and raise and educate her.

That since his last marriage, to-wit: in the month of August, 1887, your petitioner demanded the possession of the said child, and that Thomas F. Burrus said to him he would never give her up until he was forced to.

That again in December, A.D. 1888, he had his present wife call upon the said Thomas F. Burrus and Catherine Burrus, and in petitioner's name, as well as in name of his wife, ask for the peaceable possession of the child, and tried to induce them to surrender said child to your petitioner, as they of right should do, but that they said they would not give her up until forced to.

Your petitioner represents that he has made use of all means in his power, except force, to obtain his said child;

that he is fearful if he attempts to take her in that way that the said Thomas F. Burrus and Catherine Burrus will do injury either to your petitioner or the child, or perhaps to both.

Your petitioner represents that the said child does not receive proper education nor instruction; that she does not attend either school, church, nor Sunday-school; that she is compelled to associate with improper company.

That the child has no bed of her own, but is compelled to sleep in the same bed with her grandparents, who are aged and unhealthy, especially the grandmother, who is not only sickly, but is also addicted to the habit of laudanum-taking, and that the said child is not kept clean, nor properly washed nor dressed, and that by reason of said neglect and uncleanliness, she not only suffers bodily ill, but is also forming improper habits, and is being left to come up in such a way as is revolting to any civilized, educated, and Christianized parent.

Your petitioner shows that he is of abundant financial means to bring up, care for, and educate his said child in such a way as is proper and right.

That his wife is also desirous to help and assist your petitioner, and will render a mother's care to your petitioner's child.

That by reason of her natural goodness, education, and refinement she is especially well equipped to act a mother's part; and

That she joins the wishes of your petitioner in his desire to have custody and control of the said Evaline Estelle.

Your petitioner, therefore, prays that a writ of habeas corpus may be issued, and that the said Thomas F. Burrus and

Catharine Burrus may be ordered to produce on a certain day and at a certain place, to be by your Honor named and designated, the said Evaline E. Miller, and that she, the said Evaline E. Miller, may be delivered to your petitioner, and your petitioner will ever pray, etc.

LEWIS B. MILLER,
By J. W. Schomp, Attorney.

STATE OF OHIO, }
Butler County, } ss.

Lewis B. Miller, of full age, being duly sworn, on his oath saith that he is the petitioner in the foregoing petition; that the matters and things therein set forth, so far as they relate to his own acts or stated of his own knowledge, they are true; and so far as they relate to the acts of others, or are stated on information and beliefs, he believes them to be true. LEWIS B. MILLER.

Sworn and subscribed to before me this 4th day of April, A.D. 1889. F. J. CONE,
[SEAL.] *Notary Public, Butler County, Ohio.*

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEBRASKA.

IN THE MATTER OF THE HABEAS CORPUS OF EVALINE E. MILLER ON APPLICATION OF LEWIS B. MILLER.

RETURN TO WRIT.

And now come said Thomas F. Burrus and Catherine Burrus, according to the command of the writ herein, and

we produce in said court the body of said Evaline E. Miller, who has been in our custody ever since the 18th day of May, A.D. 1882.

She is our granddaughter and daughter of our deceased daughter, Evaline Miller, *nee* Burrus, late wife of the said relator, Lewis B. Miller.

The said Evaline E. Miller is the only child of our said daughter, and was born October 7th, A.D. 1881, and her mother, our said daughter, died May 18th, A.D. 1882, within about one-half mile of our residence and farm in said Nemaha County, Nebraska. On the day of the death of our said daughter, the said relator, Lewis B. Miller, sent the said child to us, its grandparents, where it has been ever since. We have continually cared for it, clothed it, and fed it, as good, dutiful parents do for their own children, and we have in all things faithfully, affectionately, and abundantly acted the

parents' part toward said child, and we have become very much attached to it and it to us, as much so as if we were its natural parents, and it our natural child.

That the said relator has done nothing since the death of his said wife towards the support, care, or maintenance of said child, and he has on divers occasions, when said child was very young, and during its sickness, refused to help take care of it, and he then and at said times refused to furnish any help, to assist in caring for and nursing said child during its illness, although frequently requested so to do by Thomas F. and Catherine Burrus, the respondents herein, and he has done nothing for it since the death of its said mother except to furnish the following articles, to-wit: A few pairs of shoes and one dress.

That said respondents have often requested said relator to do something for said child, and he has as often refused.

We are very much attached to said child, and our attachment and affections are as binding and as tender as if it was our daughter.

That said relator's disregard for said child, and our care and nurture of it, together with the death of its said mother, has naturally increased and strengthened our affections for it.

Said relator has always acted as if he had little or no affection for said child.

Said relator's effort now to obtain said child we believe to be not at all for the good of the child, or because of any affection he has for it, but for the sole purpose of aggravating and annoying us, who he knows have a great and warm affection for it.

We have taken good and attentive care of said child, educated it as far as its tender age will permit, and provided

it with all the necessaries of life, and we will do our whole duty toward said child if said court will allow us to retain it.

At the time said relator delivered said child to us as aforesaid, it was very ill with black measles, and it was only by the most extraordinary care, vigilance, and attention on our part that the life of said child was preserved during the whole of said critical period of said child's life, and said relator appeared perfectly indifferent as to said child and its illness.

We are informed and believe that neither the said relator nor his said wife are proper persons to take charge of and raise said child, that it would be greatly to the damage and injury of said child if it should be taken from us and delivered to said relator.

Said child is our only grandchild, and to take it from us would break our hearts.

If said child should be delivered to said relator, it would be taken to Ohio and placed among strangers, and perpetually removed from us.

That said relator has often averred and alleged that said child should not have any part or portion of his property, and for the purpose of carrying into execution said inhuman allegation, said relator has conveyed to his present wife his real estate and property.

That said Thomas F. Burrus is a farmer, and has resided continually in said county of Nemaha, Nebraska, since 1859; that he owns and occupies a well improved farm in said county, consisting of a fractional quarter section of land worth about $5,000, with good buildings thereon; that he owns all the necessary farm implements, etc., to operate the same with; that he has the said farm well stocked with

horses, mules, cattle, hogs, etc., and he is in every way prepared and equipped to successfully operate said farm, and to care for, raise, and educate said child as it should be.

That the only incumbrance on said farm is a mortgage of $1,300, and this is his only indebtedness.

That there is a good school nine months in each year within one-half mile of said respondents' said house and home, where said child now attends school.

Respondents deny each and every allegation of said relator's application, except such as are admitted herein.

Respondents further aver that about July, A.D. 1883, in an action identical in all respects, then pending in the County Court of Nemaha County, Nebraska, by the finding, consideration, and judgment of said County Court, said respondents were adjudged to have the care, custody, and control of said child; that from said judgment said relator appealed said cause to the District Court of said Nemaha County, Nebraska, and at the fall term of 1883 of said Court said judgment was in all things affirmed, which said judgment is unreversed, and in all respects in full force and effect, and on account thereof said relator has no right or authority to bring nor to maintain this action.

Wherefore, respondents earnestly pray that this action be dismissed, and that said respondents be adjudged to have the care, control, and custody of said child.

THOMAS F. BURRUS,
CATHERINE BURRUS.

STATE OF NEBRASKA, }
Nemaha County, } ss.

I, Thomas F. Burrus, one of the respondents herein, do solemnly swear that the statements made in the foregoing pleading are true, so help me, God.

THOMAS F. BURRUS.

Subscribed in my presence and sworn to before me this 9th day of May, 1889. CHARLES P. EDWARDS,
[SEAL.] *Notary Public.*

EXHIBIT C.

BEFORE HON. E. S. DUNDY, JUDGE OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA.

IN THE MATTER OF THE PROCEEDINGS IN HABEAS CORPUS IN BEHALF OF EVALINE E. MILLER, ON PETITION AND APPLICATION OF LEWIS B. MILLER.

Now on this day come again Thomas F. Burrus and Catherine Burrus and produce the body of Evaline E. Miller, and also having made return and answer to the writ of habeas corpus issued in this case; and after examining the said return and the said reply filed by the petitioner, and hearing the proofs and reading the depositions, and hearing and considering the arguments of the respective counsel, I find that the said Evaline E. Miller is improperly and illegally detained and kept by the said Thomas F. Burrus and Catherine Burrus, and that she, the said Evaline E. Miller, should be awarded to the care and custody of her father, Lewis B. Miller, the petitioner.

It is therefore ordered that the said Evaline E. Miller be delivered and entrusted to the care, custody, and control of Lewis B. Miller; that Thomas F. Burrus and Catherine Burrus are forbidden from in any way interfering with either the said Evaline E. or the said Lewis B. Miller in taking, receiving, and assuming the care, custody, and control of the said Evaline E. Miller.

And it is further ordered and adjudged that Thomas F. Burrus and Catherine Burrus produce the body of Evaline E. Miller before this Court at the Court room of the United States District Court, at the city of Omaha, in the county of Douglas and state of Nebraska, within five days from the date of signing this order and adjudication.

And it is further ordered and adjudged that said Thomas F. Burrus and Catherine Burrus, his wife, pay to Lewis B. Miller all costs of these proceedings by him expended in and about these proceedings as same shall be taxed by E. S. Dundy, Jr., Esq., Clerk of said United States District Court. And in the event of said Thomas F. Burrus and Catherine Burrus not paying said costs within five days, it is ordered and adjudged that the said Lewis B. Miller have the process of this Court with the officers thereof to enforce the production and return to Lewis B. Miller of the said Evaline E. Miller, as well as to enforce the collection of said costs unless the same are obeyed and carried into effect within five days from this date.

Provided, that if respondents shall duly appeal from this order and give proper bond in sum of $1,000 conditioned to produce the child in Court at November, 1889, term, then the execution shall be suspended during such appeal.

ELMER S. DUNDY, *Judge.*

EXHIBIT D.

IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF NEBRASKA, BEFORE HON. E. S. DUNDY, JUDGE OF SAID DISTRICT COURT,

SITTING AS JUDGE AND HOLDING SAID COURT IN THE COURT ROOM IN THE CITY OF LINCOLN, NEBRASKA, ON WEDNESDAY, THE 5TH DAY OF FEBRUARY, IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND NINETY.

IN THE MATTER OF THE CONTEMPT OF THOMAS F. BURRUS.

Whereas, on this 5th day of February, A.D. 1890, in open Court, and in the presence of Hon. Elmer S. Dundy, Judge of said United States District Court for the District of Nebraska, came Thomas F. Burrus, who, having been brought before this Court on a rule to show cause heretofore issued by this Court on the 31st day of January, A.D. 1890, commanding and directing the said Thomas F. Burrus, on Monday, the 3d day of February, A.D. 1890, at the rooms wherein are held the Federal Court in the city of Lincoln, in Nebraska, he do show cause why he, the said Thomas F. Burrus, should not be attached for contempt of Court and disobedience of the orders and decrees of this Court heretefore pending, the same being in the matter of the habeas corpus proceedings in behalf of Evaline E. Miller, on petition of

Lewis B. Miller, her father, and wherein the said Thomas F. Burrus and Catharine Burrus were respondents—of all of which the said Thomas F. Burrus had due and legal notice—and it appearing that the said Thomas F. Burrus and Catherine Burrus forcibly took and kept the said Evaline E. Miller from said Lewis B. Miller, who was attempting to take her to his home in Ohio, and did take her to some place in Iowa, and have refused ever since to deliver her to the said Lewis B. Miller, but keep her away from Lewis B. Miller, contrary to the former orders, judgments, and adjudications of this Court.

And the said Thomas F. Burrus was also ordered to produce the said Evaline E. Miller before this Court, at the same time and place.

And it being made to appear that said rule to show cause and said order to produce the said Evaline E. Miller before this Court and Judge at said time had been duly and legally served on said Thomas F. Burrus.

And he, the said Thomas F. Burrus, coming before said Court and Judge on said 3d day of February, A.D. 1890, and showing nor offering no good and sufficient reason or excuse for his disobedience of the former orders, decrees, and adjudications of this Judge and Court in the aforesaid cause made and served upon the said Thomas F. Burrus under and by direction of this Court.

And the said Thomas F. Burrus still refusing to obey said orders, decrees, and adjudications of this Court, and still refusing to obey the said orders, and to produce the said Evaline E. Miller before this Court at this time, as he had been directed.

And the said Thomas F. Burrus not offering nor showing any legal or proper excuse for his disobedience to the former orders, judgments, and decrees of this Court in this cause heretofore made, nor any good and sufficient reason or excuse for not producing the said Evaline E. Miller before the Court at this time; but the said Thomas F. Burrus coming before this Court and Judge and defying the orders, decrees, and adjudications thereof, and refusing to obey the man dates thereof.

And the Court and Judge on the said 3d day of February, A.D. 1890, having adjourned the consideration of this matter until the 5th day of February, A.D. 1890, at the same hour and place, to which time and place the said Thomas F. Burrus was directed to be and appear.

And now, on this 5th day of February, A.D. 1890, pursuant to such adjournment before Hon. E. S. Dundy, Judge of said United States District Court, and in open Court held in the court room at Lincoln, again come the said Thomas F. Burrus, and, still refusing to obey all of said orders, decrees, and adjudications of said Court in the aforesaid proceedings made and decreed, and still refusing to produce the said Evaline E. Miller, and neither offering nor showing any proper, reasonable, or legal excuse for such disobedience and refusal, but willfully and stubbornly resisting and disobeying all of said orders, decrees, and adjudications.

Now, therefore, be it ordered and adjudged by this Court that the said Thomas F. Burrus, by reason of said acts and disobedience, was and is guilty of contempt of the authority of this Court, committed in its presence on this 5th day of February, A.D. 1890, as well as by other acts of disobedience of him, the said Thomas F. Burrus, to the former orders,

10 Orig

Supreme Court, U.S.
FILED.
MAR 10 1890
JAMES. H. McKENNEY,
CLERK.

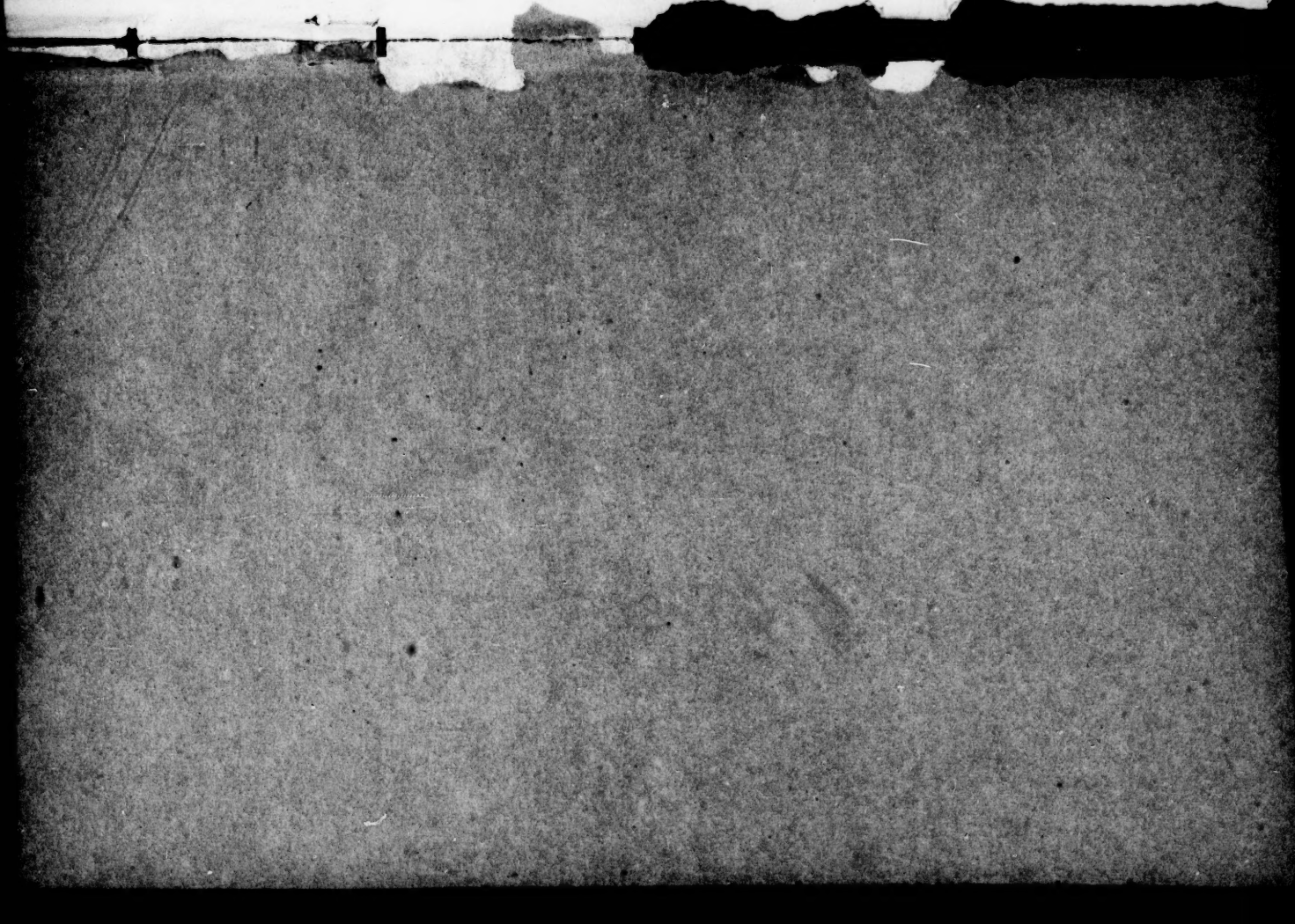
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. —. ORIGINAL.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE, IN PETITION FOR HABEAS CORPUS.

OMAHA REPUBLICAN PRINT.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE, IN PETITION FOR HABEAS CORPUS.

No. —. ORIGINAL.

Comes Brad D. Slaughter, marshal, of United States for District of Nebraska, and respondent to the rule entered herein that he show cause why writ of *habeas corpus* should not issue to the end that the said Thomas F. Burrus should not be discharged from his custody, states and shows that the said petitioner is in his custody, under and by virtue of an order and judgment of Hon. Elmer S. Dundy, Judge of the United States Court for the District of Nebraska, a copy of which order is hereto attached marked Exhibit —— , and forms a part of this, my return to the aforesaid writ.

And as a further return to this writ, if the Court decide the same necessary, he attaches hereto a true and correct copy of the whole proceedings in the controversy that brought about the judgment and order aforesaid and makes the same a part thereof as Exhibit——

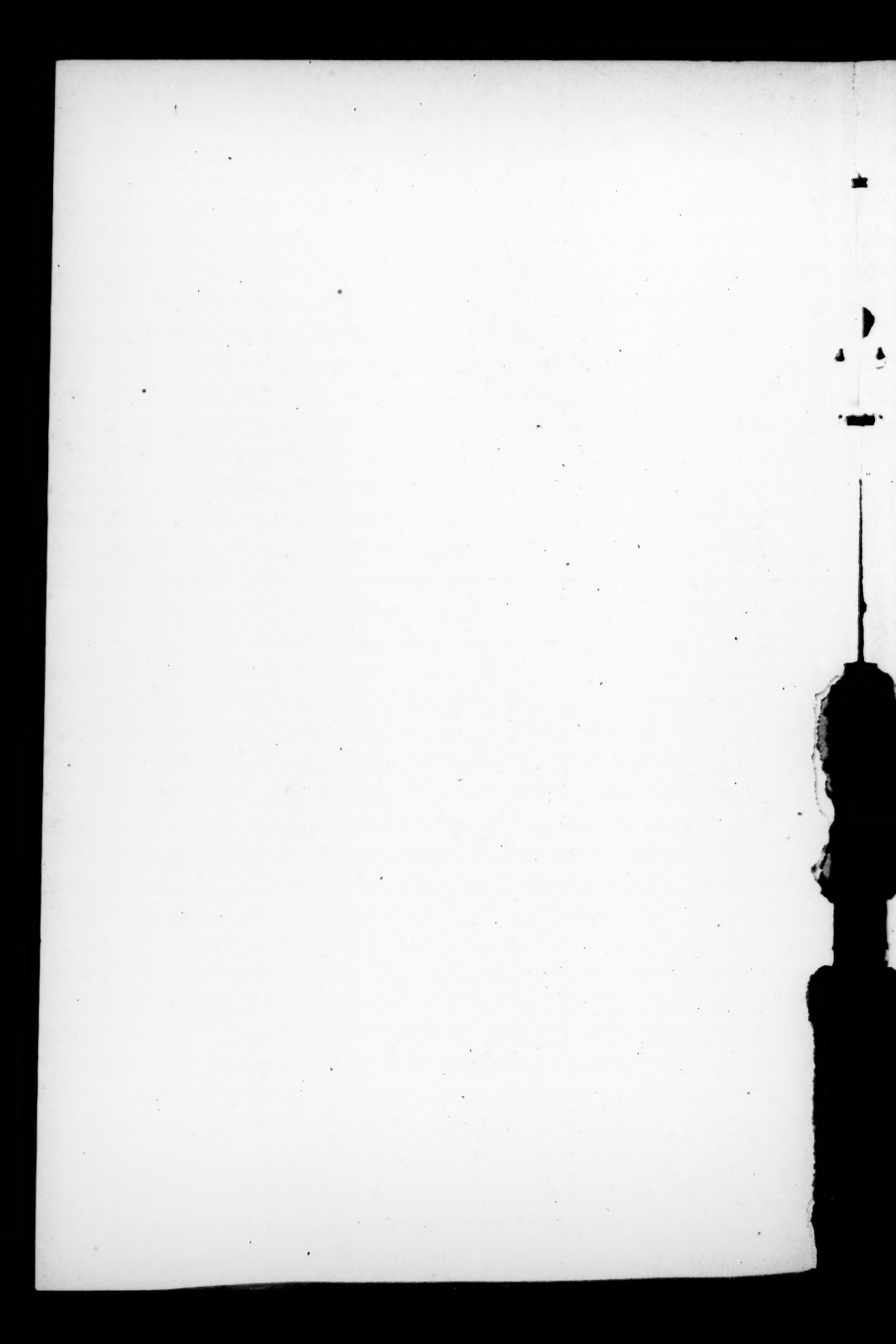
And he holds the said Thomas F. Burrus in his custody, subject and in pursuance of the aforesaid order and said judgment of the Court and submits whether he is entitled to his discharge as prayed for.

BRAD D. SLAUGHTER,
Marshal of the United States for the District of Nebraska.

IN RE PETITION OF THOMAS F. BURRUS, HABEAS CORPUS. } *Index of Return.*

Index. *Folio.*

Petition for writ	5				
Affidavits attached to petition	7	8	9		
Order for writ of habeas corpus	9	10			
Writ of habeas corpus	10	11			
Answer of Thomas F. Burrus and wife	11	12	13		
Stipulation	14	15			
Reply	15	16			
Order delivery	17	18			
Prayer for appeal	18	19			
Appeal bond	19				
Motion to amend order	20				
Order dismissing appeal	21				
Order remanding	21				
Motion for re-hearing	21				
Motion to stay	22				
Motion to amend petition	22				
Order amending petition	23				
Judgment sustaining jurisdiction	23				
Order affirmance	23				
Order returning child to petitioner	24				
Order of execution	25				
Proof of disobedience	26	27	28	29	
Rule to show cause	29	30			
Answer of Thomas F. Burrus	31	32			
Adjudication of contempt	33				
Committment	34	35			



[EXHIBIT——, referred to in Marshal's response.]

Pleas before the Hon. Elmer S. Dundy, Judge of the United States District Court, for the district of Nebraska.

Be it remembered, that at the January adjournment term of said court a petition for a writ of *habeas corpus* was filed herein, which said petition is in words and figures as follows, to-wit:

To the Honorable Elmer S. Dundy, District Judge for the United States for Nebraska.

The petition of Louis B. Miller, of the town of Oxford, in the county of Butler and state of Ohio, respectfully shows unto your Honor that the petitioner is a resident of Oxford aforesaid, and a citizen of the state of Ohio, and has been for the last past two years and longer; that he is engaged in agricultural pursuits and is about 37 years of age; that he is a married man and that his wife, Lucretia B. Miller, to whom he was married in February, A. D. eighteen hundred and eighty-seven, compose his immediate family at present time.

That petitioner further shows unto your Honor that he was previously married, and that his first wife died on the seventeenth day of May, 1882, leaving her surviving one child, Evelyn Estelle Miller, who was born on the seventh day of October, 1881.

That at the time of his wife's decease your petitioner was living in Nemaha county in the state of Nebraska. That his first wife died of measles and that at the time of her death his child was also sick with the same disease.

That the child was ordered by physicians to be removed from the house when his first wife was sick and dying, and that in pursuance of said direction, the child was temporarily taken to the residence of her grandparents, Thomas F. Burrus and Catherine Burrus, his wife, who then were and now are residents of Nemaha county, aforesaid, and citizens of state of Nebraska.

That the said child was only taken there temporarily, and that this petitioner did not then, nor has he at any time since surrendered his right to the custody, maintenance, education and control of his said child.

Your petitioner shows that since that time he has frequently demanded the said child from the said Thomas F. Burrus and Catherine Burrus, his wife, and that they and each of them have refused to give up said child to your petitioner, or to his custody and control, and have frequently told your petitioner they did not mean to give her up and that your petitioner should never have the said child, nor the custody, company nor control of her until they were compelled to release her by law.

That during the time that your petitioner was a widower, they said he could never have the child until he had a wife, or some one who could properly take care and raise and educate her.

That since his last marriage, to-wit: in the month of August, eighteen hurdred and eighty-seven, your petitioner demanded the possession of the said child, and that Thomas F. Burrus said to him he would never give her up until he was forced to.

That again in December, A. D. 1888, he had his present wife call upon said Thomas F. Burrus and Catherine Burrus, and in the petitioner's name, as well as in the name of his wife, asked for the peaceable possession of the child and tried to induce them to surrender said child to your petitioner, as they of right should do, but that they said they would not give her up until forced to.

Your petitioner represents that he has made use of all means in his power except force to obtain his said child; that he is fearful if he attempts to take her in that way, that the said Thomas F. Burrus and Catherine Burrus will do injury either to your petitioner or the child, or perhaps to both.

Your petitioner represents that the said child does not receive proper education nor instruction; that she does not attend either school, church nor Sunday school; that she is compelled to associate with improper company.

That child has no bed of her own, but is compelled to sleep in same bed with her grandparents who are aged and unhealthy, especially the grandmother, who is not only sick, but is also addicted to the habit of laudanum taking; and that the said child is not kept clean nor properly washed nor dressed; and that by reason of said neglect and uncleanliness, she not only suffers bodily ill but is also forming improper habits, and is being left to come up in such a way as is revolting to any civilized, educated and Christianized parent.

Your petitioner shows that he is of abundant financial means to bring her up, care for and educate his said child in such a way as is proper and right.

That his wife is also desirous to help and assist your petitioner, and will render a mother's care to your petitioner's child.

That by reason of her natural goodness, education and refinement she is especially well equipped to act a mother's part. That she joins the wishes of your petitioner in his desire to have custody and control of said Evelyn Estelle.

Your petitioner, therefore, prays that a writ of *habeas corpus* may be issued, and that the said Thomas F. Burrus and Catherine Burrus may be ordered to produce, on a certain day and at a certain place, to be by your Honor named and designated, the said Evelyn E. Miller and that she, the said Evelyn E. Miller, may be delivered to your petitioner, and your petitioner will ever pray, etc.

LOUIS B. MILLER,
By JOHN SCHOMP,
Attorney.

STATE OF OHIO,

Butler County, ss:

Louis B. Miller, of full age, being duly sworn, on his oath saith: That he is the petitioner in the foregoing petition; that the matters and things therein set forth, so far as they relate to his own acts or stated, of his own knowledge, they are true. And so far as they relate to the acts of others or are stated on information and beliefs, he believes them to be true.

LOUIS B. MILLER.

Sworn and subscribed to before me this 4th day of April, A. D. 1889.

F. J. CONE,
Notary Public,
Butler County, Ohio.

[SEAL.]

(Signed) LOUIS B. MILLER.

Sworn to and subscribed in my presence this 11th day of December, A. D. 1889.

(Signed) E. S. DUNDY, JR.,
Clerk.

Upon the back of said petition appear endorsements in words and figures following to-wit:

No. 423—H., U. S. District Court, District of Nebraska.

In the matter of the *habeas corpus* of Evelyn E. Miller on application of Louis B. Miller, petition for writ, etc. John Schomp, Att'y, filed April 23rd, 1889, E. S. Dundy, Jr., Clerk.

Thereupon afterwards on said 23rd day of April, 1889, the following affidavits were filed in said case.

STATE OF OHIO,

———*County, ss:*

Rev. H. A. McDonald, being duly sworn deposeth and saith; that he is pastor of the United Presbyterian church, of Oxford; that he is and has been for past two and one-half years acquainted with Louis B. Miller, who resides near him; that said Miller is a farmer and, as appears to me, in good financial circumstances; that he is an upright, worthy citizen, a sober and industrious man, and bears a good reputation in all respects. That he also knows his wife, Lucretia B. Miller, whom he considers a proper, careful and educated woman and well adapted to have the care, oversight and instruction of a very young girl who may be intrusted with her. That said Miller and his wife are attendants at church of which deponent is pastor and that his acquaintanceship and his duties as pastor have frequently placed him in such a position as to give him opportunities to know, and enable him to judge as to that whereof he testifies.

H. A. MCDONALD.

Sworn and subscribed to before me this 4th day of April, A. D., 1889.

F. J. CONE, *Notary Public,*
Butler County, Ohio.

STATE OF OHIO,
Butler County, ss:

Thomas Fritton being duly sworn deposeth and saith that he is about 56 years of age. That he is a merchant at Hamilton, Butler County, Ohio. There he has resided for past forty-four years. That he has known Louis B. Miller for over twenty years (20 years) and Lucretia B. Miller, his wife for the past one year and upwards; that in his belief each and both of them are honorable, moral and worthy people; that Louis B. Miller is a farmer in comfortable financial circumstances, is a sober and industrious citizen and enjoys the good opinion of citizens among whom he dwells.

And further deponent saith not.

THOMAS FRITTON.

Sworn and subscribed to before me on this 9th day of April, A. D., 1889.

E. A. BELDEN, *Notary Public,*
Butler County, Ohio.

STATE OF OHIO,
Butler County, ss:

Lucretia B. Miller being duly sworn deposeth and saith that she is the wife of Louis B. Miller, the above named petitioner and resides with him on a farm near Oxford, in the County of Butler, and State of Ohio. That she is nearly thirty-five years of age and has been married to Louis B. Miller a little more than two years, and she joins with her husband in the desire for the care, custody and companionship of his child, Evelyn Estelle Miller. That sometime in the month of December, A. D. 1888, as the result of her own wishes and at the request of her husband, she went to see Thomas F. Burrus and Catherine Burrus, by whom the said child Evelyn was being kept, and in behalf of the child's father as well as on her own behalf, requested the said Thomas F. Burrus and Catherine Burrus, his wife, that they would permit the said child Evelyn to go and live with her father and this deponent; that she promised and assured them that the child should have proper care, treatment and education and should in all respects be properly nurtured and brought up; that she besought and pleaded with them to give her up and let them have her in a quiet and proper manner; that she gave them every assurance and promise of good care and treatment to the child and tried in every way known to her to induce them to do so. But that they each and both of them refused to listen to her entreaties and inducements, but declared that they would never give up the child until forced to do so, and other words of like force and bearing.

Deponent further saith that she promises in case the said child comes and lives with deponent's said husband and herself, that she will do all things in her power to see that the said child is properly cared for, educated and brought up and will in every way act a mother's part to the best of her skill, power, education and ability. And further deponent saith not.

LUCRETIA B. MILLER.

Sworn and subscribed to before me this 4th day of April, A. D. 1889.

[SEAL.] F. J. CONE, *Notary Public,*
Butler County, Ohio.

STATE OF OHIO,
Butler County, ss:

A. F. Sloane being duly sworn deposeth and saith that he is and has been for the past two years acquainted with Louis B. Miller, who resides near the village of Oxford, Butler County, Ohio; that said Miller is a

farmer and as appears to me is in fair financial circumstances; that he is an upright, worthy citizen, a sober and industrious man and bears a good reputation in this communitiy; that he also knows his wife, Lucretia B. Miller, whom he recognizes as a lady of the highest respectability, educated and refined and well adapted to have the care and training of a young girl who may be placed in her care and keeping, and further my acquaintance with the above named parties is such that I feel satisfied in making the statements.

H. F. SLOANE.

Subscribed in my presence and sworn to before me this 8th day of April, A. D., 1889, and I hereby certify that said affiant is personally known to me and his statements are entitled to full faith and credit.

[SEAL.] F. J. CONE, *Notary Public,*
Butler County, Ohio.

STATE OF OHIO,
Butler County, ss:

W. H. Gillard being duly sworn, deposeth and saith that he is, and has been for the past 20 years acquainted with Louis B. Miller, who resides near the village of Oxford, Butler County, Ohio; that said Miller is a farmer, and as appears to me in fair financial circumstances; that he is an upright worthy citizen, a sober and industrious man and bears a good reputation in all respects: That he also knows his wife, Lucretia B. Miller, whom he considers a proper, careful and educated woman and well adapted to have the care, oversight and instruction of a very young girl who may be intrusted to her, and further that my acquaintancesbip with the above named parties is such as to enable me to judge as to statements above set forth.

WM. H. GILLARD.

Subscribed in my presence and sworn to before me this 8th day of April, A. D., 1889, and I hereby certify that affiant is personally known to me and is reputable and whose statements are entitled to full credit and belief.

[SEAL] F. J. CONE, *Notary Public,*
Butler County, Ohio.

Upon the back of said affidavits appear endorsements in words and figures following to-wit:--423 H, U. S. District Court, District of Nebraska. In the matter of the *habeas corpus* of Evelyn E. Miller on application of Louis B. Miller. Affidavits etc., filed April 23d, 1889.

E. S. DUNDY, JR., *Clerk.*

Thereupon afterwards to wit: on the 23d day of April, 1889, and order for a writ of *habeas corpus* was filed in said case which said order is in words and figures following to-wit:

In the United States District Court, District of Nebraska.

In the matter of the application of Louis B. Miller for a writ of *habeas corpus* for Evelyn E. Miller.

Now on this day came Louis B. Miller of the town of Oxford, county of Butler, state of Ohio, by E. C. Wood and John Schomp his attorneys, and presented his petition duly verified, praying for a writ of *habeas corpus* for the possession of Evelyn E. Miller, a minor child of said Louis B. Miller, and it appearing to me by said petition and facts therein alleged that one

Evelyn E. Miller, a minor child of said Louis B. Miller is unlawfully detained and held from the custody, care and control of said Louis B. Miller, her father, the petitioner, by Thomas F. Burrus and Catherine Burrus his wife, of the county of Nemaha, State of Nebraska.

It is therefore ordered that a writ of *habeas corpus* be allowed to issue in favor of the said Louis B. Miller for the said Evelyn E. Miller. Returnable on the————day of May, A. D. 1889. And be directed to Thomas F. Burrus and Catherine Burrus, of the County of Nemaha, in the state of Nebraska.

ELMER S. DUNDY, *Judge.*

Upon the back of said order appear endorsements in words and figures following to-wit:—423 H., U. S. District Court, District of Nebraska. In the matter of the *habeas corpus* of Evelyn E. Miller, a minor, by Louis B. Miller, her father. Order for writ of *habeas corpus* filed April 23d, 1889.

E. S. DUNDY, JR., *Clerk.*

Thereupon afterwards, to-wit on the 4th day of May, A. D. 1889, a stipulation was filed in said case, which said stipulation is in words and figures as follows to-wit:

In the matter of the application for writ of *habeas corpus* of Evelyn E. Miller on petition of Louis B. Miller.

It is hereby agreed that the time for production of said Evelyn E. Miller be extended until Tuesday, May 13th, provided return is made to writ in other respects according to command of same, May 3d, 1889.

JNO. SCHOMP, *Att'y of* Louis B. Miller.
THOMAS F. BURRESS.
CATHERINE BURRESS.
STULL & EDWARDS, *their att'ys.*

Upon the back of said stipulation appear endorsements in words and figures, following to-wit: 423 H. In the matter of the application for writ of *habeas corpus* of Evelyn E Miller. Stipulation filed May 4th, 1889.

E. S. DUNDY, JR., *Clerk.*

Thereupon, afterwards, to-wit on the ninth day of May, 1889, the writ of *habeas corpus* was returned and filed in said case, which said writ is in words and figures following to-wit:

THE UNITED STATES OF AMERICA.

To Thomas F. Burrus and Catherine Burrus:

You are hereby commanded to have the body of Evelyn E. Miller, by you unlawfully detained and held from the custody and control of Louis B. Miller, as is alleged, together with the cause of her detention and holding by you, before Honorable Elmer S. Dundy, Judge of the United States District Court for the district of Nebraska, at the United States Court

House, in the Post Office Building, in the city of Omaha, in the state of Nebraska, on or before the expiration of ten days after you accept of this writ.

Then and there to be dealt with according to law, and have you then and there this writ, with the cause of detention, etc.

Witness Honorable Elmer S. Dundy, Judge of the United States District Court for the District of Nebraska, and the seal of said court affixed hereto this 23d day of April, A. D. eighteen hundred and eighty-nine.

ELMER S. DUNDY, *Judge.*

Attached to this writ is the return of the Marshal, which said return is in words and figures following, to-wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 23d day of April, 1889, I received this writ and on the 1st day of May, 1889, I served the same on the within named Thomas F. Burrus and Catherine Burrus, in Nemaha county, state and district of Nebraska, by delivering to and leaving with each a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska.
By R. Q. STEWART,
Deputy United States Marshal.

Upon the back of said writ appear endorsements in words and figures following, to-wit:

423 H. In the matter of the application of Louis B. Miller for a writ of *habeas corpus.* Writ returned and filed May 9th, 1889.

ELMER S. DUNDY, JR., *Clerk.*

MARSHAL'S COSTS.

Service	$ 4 00
R. R. Fare	5 10
Use of Teams	3 00
Subsistance	2 00
	$14 10

Thereupon afterwards to-wit: On the 10th day of May, 1889, the return to writ was filed in said case, said return in words and figures following, to-wit:

In the District Court of the United States, District of Nebraska.

In the matter of *habeas corpus* of Evelyn E. Miller on application of Louis B. Miller.

Return to writ.

And now comes said Thomas F. Burrus and Catherine Burrus according to the command of the writ herein, and we produce in said court the body of said Evelyn E. Miller, who has been in our custody ever since the 18th day of May, A. D. 1882.

She is our granddaughter, and daughter of our deceased daughter, Evelyn Miller *nee* Burress, late wife of the said relator, Louis B. Miller.

The said Evelyn E. Miller is the only child of our said daughter and was born October 7th, 1881, and her mother, our said daughter, died May 18th, A. D. 1882, within about one-half mile of our residence and farm, in said Nemaha county, Nebraska. On the day of the death of our daughter the said relator, Louis B. Miller, sent the said child to us, it's grandparents, where it has been ever since. We have continually cared for it, clothed it, and fed it, as good, dutiful parents do for their own children; and we have, in all things, faithfully, affectionately and abundantly acted the parents part toward said child, and we have become very much attached to it and it to us, as much so as if we were it's natural parents and it our natural child.

That the said relator has done nothing since the death of his said wife towards the support, care and maintenance of said child, and he has on divers occasions, when said child was very young and during its sickness refused to help to take care of it, and he then, and at said times refused to furnish any help to assist in caring for and nursing said child during its illness, although frequently requested so to do by Thomas F. and Catherine Burrus, the respondents herein, and he has done nothing for it since the death of its said mother except to furnish the following articles, to-wit. A few pairs of shoes and one dress.

That said respondents have often requested said relator to do something for said child, and he has as often refused.

We are very much attached to said child, and our attachment and affections are as binding and as tender as if it was our own daughter.

That said relator's disregard for said child, and our care and nurture of it, together with the death of its said mother, has naturally increased and strengthened our affections for it.

Said relator has always acted as if he had little or no affection for said child.

Said relator's effort now to obtain said child, we believe to be not at all for the good of the child, or because of any affection he has for it but for the sole purpose of aggravating and annoying us, who, he knows, have a great and warm affection for it.

We have taken good and attentive care of said child, educated it as far its tender age will permit, and provided it with all the necessaries of life, and we will do our whole duty toward said child, if said court will allow us to retain it.

At the time said relator delivered said child to us as aforesaid, it was very ill with black measles, and it was only by the most extraordinary care, vigilance and attention on our part, that the life of said child was preserved during the while of said critical period of said child's life, and said relator appeared perfectly indifferent as to said child and its illness.

We are informed and believe that neither the said relator nor his said wife are proper persons to take charge and raise said child, that it would be greatly to the damage and injury of said child if it should be taken from us and delivered to said relator; said child is our only grandchild, and to take

it from us would break our hearts. If said child should be delivered to said relator it would be taken to Ohio and placed among strangers, and perpetually moved from us. That said relator has often averred and alleged that said child should not have any part or portion of his property, and for the purpose of carrying into execution said inhuman allegation, said relator has conveyed to his present wife his real estate and property. That said Thomas F. Burrus is a farmer and has resided continually in said county of Nemaha, Nebraska, since 1869, that he owns and occupies a well improved farm in said county consisting of a fractional quarter section of land worth about $5,000.00 with good buildings thereon; that he owns all the necessary farm implements, etc., to operate the same with; that he has the said farm well stocked with horses, mules, cattle, hogs, etc., and he is in every way prepared and equipped to successfully operate said farm, and to care for, raise and educate said child as it should be.

That the only incumbrance on said farm is a mortgage of $1,300.00 and this is his only indebtedness.

That there is a good school nine months in each year within one-half mile of said respondents' house and home, where said child now attends school.

Respondents deny each and every allegation of said relator's application, except such as are admitted herein.

Respondents further aver that about July, A. D. 1883, in an action identical in all respects then pending in the County Court of Nemaha County, Nebraska, by the finding, consideration and judgment of said County Court, said respondents were adjudged to have the care, custody and control of said child; that from said judgment, said relator appealed said cause to the District Court of said Nemaha County, Nebraska, and at the fall term, 1883, of said court, said judgment was in all things affirmed, which said judgment is unreversed, and in all respects in full force and effect, and on account thereof, said relator has no right or authority to bring nor maintain this action.

Wherefore respondents earnestly pray that this action be dismissed and that said respondents be adjudged to have the care, control and custody of said child.

E. W. THOMAS, and
JNO. S. STULL,
Attorneys for Respondents.

STATE OF NEBRASKA,
County of Nemaha, ss:

I, Thomas F. Burrus, one of the respondents herein, do solemnly swear that the statements made in the foregoing pleading to be true, so help me God.

THOS. F. BURRUS.

Subscribed in my presence and sworn to before me this 9th day of May, 1889.

[SEAL.] CHARLES P. EDWARDS, *Notary Public.*

Upon the back of this return to writ appear endorsements in words and figures following, to-wit:—423 H. in U. S. District Court, District of Nebraska. In the matter of the *habeas corpus* of Evelyn E. Miller on application of Louis B. Miller. Return to writ filed May 10th, 1889.

ELMER S. DUNDY, JR., *Clerk.*
E. W. THOMAS and
STULL & EDWARDS,
Attorneys for Respondents.

Thereupon, afterwards, to-wit: On the 13th day of May a motion for security for cost was filed in said case, which said motion was in words and figures following, to-wit:

In United States District Court, District of Nebraska.

In the matter of the *habeas corpus*, Evelyn E. Miller, Louis B. Miller, applicant or relator, Thomas F. Burrus and Catherine Burrus, respondents. And now come said respondents and move said court here to require said relator to give security for costs for the following reasons, to-wit:

1st. Said relator has paid to the clerk of said court but ten (10) dollars, which has been expended.

2d. Said relator is a non-resident of the State of Nebraska, and a resident of the State of Ohio.

3d. Said relator has no property within the jurisdiction of this court and he has not given security for costs as provided by law.

E. W. THOMAS and
JNO. S. STULL,
Att'ys for relator.

Upon the back of said motion endorsement appear in words and figures, following, to-wit: 423—H, *habeas corpus* Evelyn E. Miller——Louis B. Miller——Motion for security for costs——Filed May 13th, 1889. Elmer S. Dundy, Jr., Clerk——E. W. Thomas and Jno. S. Stull, atty's for relator.

Thereupon, afterwards, to-wit: On the 13th day of May, 1889, a stipulation was filed in said case, which stipulation was in words and figures following, to-wit:

Before Honorable Elmer S. Dund , Judge United States District Court.

In matter of *habeas corpus* proceedings of Evelyn E. Miller, on application of Louis B. Miller.

It is hereby stipulated that the hearing of this case be set for Friday, May 31st, at United States court room in Omaha, before Hon. E. S. Dundy; that the child, Evelyn E. Miller, may remain in custody of Thomas F. Burrus and Catherine Burrus until that day, subject to the order of this court; nevertheless, that either party may have leave

to take deposition of witnesses residing out of this state or as provided by law, on usual legal notice to be used on said hearing.

May 13th, 1889.

JNO. SCHOMP, *Att'y relator.*
Thomas F. Burrus and
Catherine Burrus by
E. W. THOMAS and
JNO. S. STULL, *their Att'ys.*

Upon the back of said stipulation endorsements appear in words and figures following, to-wit: U. S. District Court——423 H——Before Hon. E. S. Dundy, Judge——In the matter of the application for *habeas corpus* Evelyn E. Miller by Louis B. Miller——Stipulation——Filed May 13th, 1889, Elmer S. Dundy, Jr., clerk.

Thereupon, afterwards, to-wit: The 31st day of May, 1889, the following proceedings were had in said case as appear of record on folio 514 of journal "G" of said court, to-wit:

423 H.

In the matter of the *habeas corpus* application for the body of Evelyn E. Miller, by L. B. Miller.

On motion of John Schomp, the attorney for the petitioner, it is ordered by the Court, that the petitioner be, and he is hereby allowed to reply to the return of the writ. It is further ordered that this case be, and the same is hereby referred to the clerk to take the testimony herein.

Thereupon, afterwards, to-wit: on the 31st day of May, 1889, a reply was filed in said case, which reply was in words and figures following, to-wit:

United States District Court, before Hon. Elmer S. Dundy, Judge of the United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings of Evelyn E. Miller on petition of Louis B. Miller.

The reply of Louis B. Miller, petitioner, to the return made by said Thomas F. Burrus and Catherine, to the writ of *habeas corpus* heretofore issued in the cause, or unto so much of the same as he is advised it is material and proper to make answer unto. While he denies that anything in said return set forth, would be any legal excuse for returning said child even if the same were true-says that he does not know of his own knowledge how much said grandparents may have done for said child (but does know that they have left many things undone that they should have done), nor how much they may have become attached to her, nor many other things in relation to their actions and doings, but leaves them to maintain the same as they may be able and as is proper for them so to do. But this petitioner says, that it is not true that he has ever refused to care for said child, or assist in caring for it either sick or well, but says that he has always been desirous and anxious to do any and all things for the comfort and support of said child as he might be able; that he has offered and tendered to them money

for her maintenance and support, has paid her doctor's bill and other expenses and has paid all things proper that he has been asked to pay; that he loves the child, and is now and has at all times been prompted in his actions toward the child by her best interests and happiness, and because he believes that he and his wife are better able to take care of, educate and instruct the child and rear her to a life of usefulness and happiness, than any other person or persons; that while it is true that he desires to take the child to his own home, yet love for his child and respect for his deceased wife, the child's mother, will ever forbid him in any way to sever the proper cords of kinship and love that should attach and bind together grandparents and grandchild, and he shall ever encourage a proper amount of visiting and re-visiting between her and her grandparents.

This petitioner says that it is not true that he has ever alleged or averred that his child should not have any portion of his property, but on the contrary he has always desired his child to have full benefit of all of his possessions, and that it is not only his wish but also the wish of his wife, that Evelyn should be not only the petitioner's natural and legal heir, but that she may be so adopted by his wife that the child may become to her a legal heir, and be bound to her not only by all ties of affection and engrafted love, but also of a legalized kinship and heirship.

This petitioner denies that any court has ever made any adjudication that does or can in any way effect his claim and rights to the possession of his child or in any way stop this petitioner from bringing or maintaining this action.

May 30, 1889. LOUIS B. MILLER by
JNO. SCHOMP, *Att'y petitioner.*

STATE OF NEBRASKA,
County of Douglas, ss:

Louis B. Miller, of full age, being duly sworn, deposeth and saith that the matters and things in above reply set forth are true as he verily believes. LOUIS B. MILLER.

Sworn and acknowledged before me this 30th day of May A. D., 1889.
A. L. OFFUTT,
Notary Public.

Upon the back of said reply endorsements appear in words and figures following, to-wit: 423 H——U. S. District Court for Nebraska——Before Hon. E. S. Dundy, Judge, etc.——In the matter of the *habeas corpus* proceedings of Evelyn E. Miller on petition and application of Louis B. Miller——Reply, etc.——E. C. Wood——Jno. Schomp, att'ys——Filed May 31st, 1889, E. S. Dundy, Jr., Clerk.

Thereupon, afterwards, to-wit: The 3d day of June, 1889, a bond was filed in said case, which bond was in words and figures following, to-wit:

In the District Court of the United States, District of Nebraska.

In the matter of the application of Louis B. Miller for writ of *habeas corpus* for the body of Evelyn E. Miller, Thomas F. Burrus and Catharine

Burrus, respondents. Whereas the testimony has all been taken in the above cause as ordered by said court, and the same has not been written out, and the Judge of said court is busily engaged as presiding Judge of the Circuit court of said district and unable to hear the argument in said cause. Now, therefore, we the said Thomas F. Burrus as principal and Jno. S. Stull, his surety, acknowledge ourselves to owe and be indebted to the United States of America, the District Judge of said district (the Hon. E. S. Dundy, Sr.) and Louis B. Miller, relator, to be levied of our goods and chattels, lands and tenements to be void. However, if the said Thomas F. Burrus shall produce in said court the body of said Evelyn E. Miller at the time said court sets said cause for argument and in the meantime to allow said Louis B. Miller and his wife to visit said child, and said respondents shall keep said child in Omaha, Nebraska, until June 5th, 1889, at 10 o'clock A. M. of said day, and shall in all respects obey the orders of said court in said matters prior to the determination thereof by said Judge.

THOS. F. BURRUS,
JNO. S. STULL.

Dated June 3d, 1889.

Subscribed and acknowledged this 3d day of June, 1889.

E. S. DUNDY, JR., *Clerk.*

Upon the back of said bond endoresments appear in words and figures following, to-wit:——423 H——In the matter of the *habeas corpus* of E. E. Miller——Bond——Filed June 3rd, 1889——E. S. Dundy, Jr., Clerk.

Thereupon, afterwards, to-wit: The 25th day of June, 1889, the following proceedings were had in said case as appear of record on folio 577, of Journal "G," of said Court, to-wit:

Before Hon. E. S. Dundy, Judge of the United States District Court, District of Nebraska.

In the matter of the proceedings in *habeas corpus* in behalf of Evelyn E. Miller, on petition and application of Louis B. Miller.

Now on this day came again Thomas F. Burrus and Catherine Burrus and produced the body of Evelyn E. Miller; and also having made return and answer to the writ of *habeas corpus* issued in this case; and after examining the said return and the said reply filed by the petitioner, and hearing the proofs and reading the depositions and hearing and considering the arguments of the respective counsel, I find that the said Evelyn E. Miller is improperly and illegally detained and kept by the said Thomas F. Burrus and Catherine Burrus, and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis B. Miller, the petitioner.

It is therefore ordered that the said Evelyn E. Miller be delivered and entrusted to the care, custody and control of Louis B. Miller; that Thomas F. Burrus and Catherine Burrus are forbidden from in any way interfering with either the said Evelyn E. Miller or the said Louis B. Miller in taking, receiving and assuming the care, custody and control of the said Evelyn E. Miller.

And it is further ordered and adjudged that Thomas F. Burrus and Catherine Burrus produce the body of Evelyn E. Miller, before this Court at the court room of the United States District Court at the City of Omaha, in the County of Douglas and State of Nebraska, within five days from the date of signing this order and adjudication.

And it is further ordered and adjudged that said Thomas F. Burrus and Catherine Burrus, his wife, pay to Louis B. Miller all costs of these proceedings by him expended in and about these proceedings as same shall be taxed by E. S. Dundy, Jr., Esq., Clerk of said United States District Court. And in the event of said Thomas F. Burrus and Catherine Burrus not paying said costs within said five days it is ordered and adjudged that the said Louis B. Miller have the process of this court with the officers thereof to enforce the production and return to Louis B. Miller of the said Evelyn E. Miller as well as to enforce the collection of said costs, unless the same are obeyed and carried into effect within five days from this date. Provided that if respondents shall duly appeal from this order and give proper bond in sum of $1,000.00 conditioned to produce the child in Court at November, 1889, term, then the execution of this order shall be suspended during such appeal. ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to-wit: the 25th day of June, 1889, an application for appeal was filed in said case, which application for appeal was in words and figures following, to-wit:

In the District Court of the United States, District of Nebraska.

In the matter of the application of Louis B. Miller for writ of *habeas corpus* for the body of Evelyn E. Miller, an infant, Thomas F. Burrus and Catherine Burrus respondents, and now come said respondents and pray for an appeal from the judgment in the above cause.

G. M. LAMBERTSON and
JNO. S. STULL,
Att'ys for respondents.

Upon the back of said application for appeal endorsements appear in words and figures following, to-wit:——In re *habeas corpus*——Evelyn E. Miller——423 H——Application for Appeal——Filed June 25th, 1889——E. S. Dundy, Jr., Clerk——G. M. Lambertson and Jno. S. Stull, att'ys for respondents.

Thereupon, afterwards, to-wit:——The 26th day of June, 1889, a prayer for appeal was filed in said case, which prayer for appeal was in words and figures following, to-wit:

In the District Court of the United States, for the District of Nebraska.

In the matter of the *habeas corpus* of Evelyn E. Miller on the application of Louis B. Miller. } Prayer for Appeal.

Now comes Thomas F. Burrus and Catherine Burrus, respondents in the above entitled proceeding and prays an appeal to the Circuit Court of the United States for the District of Nebraska from the judgment and

order of the said United States District Court for the State and District of Nebraska, for the surrender of the child, Evelyn Miller, to the custody of the relator, and prays the Court to remand the said Evelyn Miller to the custody of the said respondents pending the hearing on said appeal.

And your respondents here tendered a bond of one thousand dollars ($1,000.00) on the condition that they will have the said Evelyn Miller before the said Circuit Court at Omaha, Nebraska, on the second Monday in November, there to remain and abide the order and judgment of the said Circuit Court.

Your respondents pray that the petition, writ, answer and return together with the testimony be transferred and transmitted to said Circuit Court for the use and information of the Court upon the hearing of said appeal.

J. S. STULL,
G. M. LAMBERTSON,
Attorneys for Respondents.

Upon the back of said Prayer for Appeal endorsements appear in words and figures following, to-wit: 423 H. In the matter of *habeas corpus* of Evelyn Miller. Prayer for Appeal.—Filed June 26th, 1889.—E S. Dundy, Jr., Clerk; J. S. Stull, G. M. Lambertson, Att'ys for Respondents.

Thereupon, afterwards, to-wit, on the 27th day of June, 1889, a respondent's appeal bond was filed in said case, which respondents appeal bond was in words and figures following, to-wit:

In the District Court of the United States, District of Nebraska.

In the matter of the application of Louis B. Miller for writ of *habeas corpus* for the body of Evelyn E. Miller, Thomas F. Burrus and Catherine Burrus, respondents.

We, Thomas F. Burrus and Catherine Burrus as principals and T. J. Majors and Wm. G. Swan, their sureties, acknowledge themselves to owe and are indebted to said Louis B. Miller, relator, in the penal sum of one thousand ($1,000) dollars to be levied of our goods and chattels, lands and tenements if default be made in the conditions following, to-wit: Whereas, on June 25th, 1889, said court rendered judgment in said cause in favor of said relator and against said respondents, and said respondents have appealed therefrom to the Circuit Court of the United States, District of Nebraska, and by order of said District Court said respondents are required to execute a bond in the penal sum of $1,000.00 for the surrender of aforesaid child in said Circuit Court at the November, 1889, term thereof and to abide the order of said court. Now, therefore, if said respondents shall surrender said child in said Circuit Court at said November, 1889, term, and abide the order of said Court, then this obligation to be void, otherwise to remain in full force.

Signed in presence of John S. Stull.

THOS. F. BURRUS,
CATHERINE BURRUS,
THOS. J. MAJORS,
WILLIAM G. SWAN.

STATE OF NEBRASKA,
Douglas County, ss:

The foregoing bond and securities appear this 26th day of June, A. D. 1889. E. S. DUNDY, JR., Clerk.

Upon the back of said respondents, appeal bonds endorsement appear in words and figures following, to-wit: In re Evelyn E. Miller, *habeas corpus* ——423 H,——Respondents appeal bond——Filed June 27th, 1889—— E. S. Dundy, Jr., Clerk——G. M Lambertson & Jno. S. Stull, Atty's for respondents.

Thereupon, afterwards, to-wit: On the 6th day of November, 1889, a motion to amend decree and order was filed in said case, which said motion to amend decree and order is words and figures following, to-wit:

Before Hon. E. S. Dundy, Judge U. S. District Court, District of Nebraska.

In the matter of the *habeas corpus* proceedings of Evelyn E. Miller, on petition of Louis B. Miller.

Now comes the said petitioner, Louis B. Miller, and move that the said decree and order in this case heretofore made, be amended by striking therefrom such part thereof as orders and directs that said respondent, Thomas F. Burrus, may take an appeal from the said order to the United States Circuit Court, or that orders a stay in proceedings pending such appeal, for the following reasons:

1st. Because such appeal is not allowable under the Statutes of the United States and the decisions of the United States thereupon.

2d. Because said respondents, Thomas F. Burrus and Catherine Burrus, have not pursued the order of the Court in good faith and with proper diligence. On motion of John Schomp, Att'y of L. B. Miller, petitioner.

Upon the back of said motion to amend decree and order endorsements appear in words and figures following, to.wit:

Before Hon. E. S. Dundy, Judge U. S. District Court, District of Nebraska.——In the matter of *habeas corpus* proceedings of Evelyn E. Miller on petition of Louis B. Miller. Motion to amend decree and order ——Filed Nov. 6, 1889——E. S. Dundy, Jr., Clerk. Jno. Schomp, Att'y for L. B. Miller.

Thereupon, afterwards, to-wit:—On the 12th day of November, 1889, an "Order remanded" was filed in said case, which said order is in words and figures following, to-wit:

At a session of the Circuit Court of the United States, for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the 12th day of November, 1889, the Honorable David J. Brewer, Judge, being present and presiding in said Court, the following, among other proceedings, were had and done, to-wit:

In the matter of the *habeas corpus* proceedings of)
Evelyn E. Miller on petition of L. B. Miller.)

This matter coming on to be heard on motion to dismiss the appeal on motion of relator, and the Court having heard argument on same, and considered the same; and being of the opinion that the motion be sustained and appeal dismissed.

It is ordered that said appeal be dismissed, and case remanded back from the Court from whence it came, for further proceedings at the costs of appellant to be taxed.

Upon the back of said order remanded endorsements appear in words and figures following, to-wit:

No. 423, Doc. H., United States Circuit Court, District of Nebraska. In the matter of the *habeas corpus* proceedings of Evelyn E. Miller on petition of L. B. Miller. Copy of order of Court. Filed November 12th, 1889. E. S. DUNDY, JR., *Clerk.*

The UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Elmer D. Frank, Clerk of the Circuit Court of the United States, for the District of Nebraska, do hereby certify that the above and foregoing is a true and correct copy of an order, entered upon the Journal of the proceedings of said court, in the cause therein entitled. That I have compared the same with the original entry of such order and it is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said Court, at Omaha, in said District, this 12th day of November, A. D. 1889.

[SEAL] ELMER D. FRANK, *Clerk.*

Thereupon, afterwards, to-wit:—On the 15th day of November, 1889, a motion for a rehearing was filed in said case, which said motion for rehearing is in words and figures following, to-wit:

In the District Court of the United States for the District of Nebraska.

In the matter of *habeas corpus* of Evelyn Miller.

Now comes the respondents and moves the Court to grant a hearing upon the question of the jurisdiction of the court in the premises. Also upon the question whether the judgment is sustained by the evidence and testimony.

G. M. LAMBERTSON,
Attorney for Respondents.

Upon the back of said motion for rehearing endorsements appear in words and figures following, to-wit: In the matter of *habeas corpus* Evelyn Miller. Motion for rehearing filed November 15th, 1889.

E. S. DUNDY, JR,
Clerk.

G. M. LAMBERTSON,
Attorney for Respondents.

Thereupon, afterwards, to-wit: On the 15th day of November a motion to stay execution of judgment and order of delivery was filed in said case, which said motion is in words and figures following, to-wit:

In the District Court of the United States for the District of Nebraska.
In the matter of *habeas corpus* of Evelyn Miller.

Now comes the respondents and moves the Court to stay the order made by the District Court for the delivery of the child, Evelyn Miller, to the relator, pending the hearing of a motion to vacate the judgment and order on the ground that the court is without jurisdiction of the case or controversy.

G. M. LAMBERTSON,
Attorney for Respondents.

Upon the back of said motion to stay execution of judgment and order of delivery, endorsements appear in words and figures following, to-wit:

In the matter of *habeas corpus* of Evelyn Miller. Motion to stay execution of judgment and order of delivery filed November 15th, 1889.

E. S. DUNDY, JR., *Clerk.*
G. M. LAMBERTSON,
Attorney for Respondents.

Thereupon, afterwards, to-wit: On the 2d day of December, 1889, motion to amend petition was filed in said case, which said motion is in words and figures following to-wit:

Before Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of the *habeas corpus* of Evelyn E. Miller on petition of Louis B. Miller.

And now comes the petitioner, Louis B. Miller, and moves to amend his petition by inserting therein after the words "Petitioner is" on the third line, first page, and before the words "a resident of Oxford" the words "a citizen of and," and on the twenty-fourth line of the body of the petion, after the words "and now are," and before words "residents of," the words "citizens of and."

And that such amendment be made "*nunc pro tunc*" as of the time of presenting and filing the original petition.

On motion of Jno. Schomp, attorney for Louis B. Miller.

Upon the back of said motion to amend petition, endorsements appear in words and figures, following, to-wit:

Before Hon. E. S. Dundy, Judge U. S. District Court, District of Nebraska. In the matter of *habeas corpus* proceedings of Evelyn E. Miller, on petition of Lewis B. Miller——Motion to amend petition——Filed December 2d, 1889.

ELMER S. DUNDY, JR., *Clerk.*
JNO. SCHOMP, *Att'y Petitioner.*

Thereupon, afterwards, to-wit:—On the 11th day of December, 1889, the following proceedings were had in said case as appear of record on folio 773, Journal "G" of said District Court, to-wit:

In the matter of *habeas corpus* proceedings for body of Evelyn Miller.

On motion of John Schomp, attorney for the relator herein, it is ordered by the Court, that said relator be allowed to amend his petition by interlineation, so as to show citizenship of petitioner and respondents, same to be done to-day.

Thereupon, afterwards, to-wit: on the 16th day of December, 1889, an Order of Delivery, etc., was filed in said case, which said Order of Delivery, etc., is in words and figures following, to-wit:

Before Hon. E. S. Dundy, Judge of the United States District Court, District of Nebraska.

In the matter of the Proceedings in *habeas corpus*, in behalf of Evelyn E. Miller, on petition and application of Lewis B. Miller.

This cause again coming on to be heard, and it appearing to the Court that the appeal heretofore taken by and on behalf of the respondents to remove this cause to the United States Circuit Court has been dismissed by the said United States Circuit Court, and the cause again remanded to this Court. And the Court having heard the arguments of counsel on motion to stay proceedings and dismiss the cause for want of jurisdiction of the Court. And the Court being of the opinion that the cause was properly in the Court, and before the Judge having jurisdiction of the same.

It is, on this sixteenth day of December, A. D. 1889, ordered and adjudged that the stay of proceedings heretofore granted be terminated and that the order and judgment of this Court in this cause and proceedings made on the 25th day of June, A. D. 1889, be carried into force and effect.

And it is further ordered that the said Thomas F. Burrus and Catherine Burrus, or one of them, produce the said Evelyn E. Miller before this court, at the United States court room, in the city of Omaha, Nebraska, on Wednesday, the eighteenth day of December, instant, at 10 o'clock in the forenoon.

And it is further ordered that this rule, or a copy thereof, be served on the said Thomas F. Burrus and Catherine Burrus, either personally, or by leaving a copy at their place of residence, either by the marshal of this court, or by some one by him appointed and delegated.

ELMER S. DUNDY, *Judge.*

Attached to said Order of Delivery, etc., is return of the marshal which said return is in words and figures following:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 17th day of December, 1889, I received this order, and on the 17th day of December, 1889, I served the same on the within named Thomas F. Burrus and Catherine Burrus in

Otoe County, State and District of Nebraska, by delivering to and leaving with each a certified copy thereof, with all the endorsements.

BRAD D. SLAUGHTER,
United States Marshal for the District of Nebraska.
By R. O. STEWART,
Deputy United States Marshal.

Upon the back of said order of delivery, etc., endorsements appear in words and figures following, to-wit.

Before Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller. Order of delivery, etc., filed December 18th, 1889. ELMER S. DUNDY, JR., *Clerk.*
JNO. SCHOMP, *Attorney Petitioner.*

Marshal costs:—Service, $4.00; railroad fare, $3.80; use of team, $1.50; subsistence, 50 cents. Total, $9.80. Paid by L. B. Miller.

Thereupon, afterwards, to-wit: On the 18th day of December, 1889, an order of delivery was filed in said case, which said order is in words and figures following, to-wit:

Before the Honorable Elmer S. Dundy, Judge of the United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings of Evelyn E. Miller on application of Louis B. Miller, petitioner.

This matter coming on to be heard on this 18th day of December, 1889, in the presence of the petitioner and respondents to these proceedings, by their respective attorneys, and it appearing to the court that Thomas Burrus and Catherine Burrus, the respondents have produced the said Evelyn E. Miller, and now have her in this court subject to the former and further orders of this court, and the court having listened to the arguments of the respective counsel, and still being of the opinion that the petitioner, Louis B. Miller, is entitled to the care and custody of the said Evelyn E. Miller.

It is ordered that the said Evelyn E. Miller be delivered and entrusted to the said Louis B. Miller, the petitioner, in accordance with the former order of this court. But it is further ordered, by and with the consent of the said Louis B. Miller, hereby granted, that the said petitioner shall permit the said Evelyn E. Miller to receive the visits of the said Thomas Burrus and Catherine Burrus, her grandparents, in the day time and at such hours and places as shall be seasonable and convenient, and on such number of times during each year as may seem reasonable to this court, but that with the exceptions of such visit or visits that the said Thomas Burrus and Catherine Burrus shall in no way interfere with nor molest the said Louis B. Miller in the care and custody of said Evelyn E. Miller.

I consent to the above order on condition the child shall be surrendered to me by order of the court.

L. B. MILLER, Petitioner.

The Marshal will deliver posession of the child to Miller, the petitioner.

ELMER S. DUNDY, *Judge.*

Upon the back of said order for deliver endorsements appear in words and figures following, to-wit:—Filed Dec. 18, 1889. Elmer S. Dundy, Jr., Clerk. 423 H.

Thereupon, afterwards, to-wit: on the 18th day of December, 1889, the following proceedings were had in said case, as appear of record on folio 9, Journal H, of said District Court, to-wit:

In the matter of Evelyn E. Eiller *habeas corpus* proceedings. } Order to deliver child.

This cause came on for hearing on the application of Louis B. Miller, for an order to deliver possession of the body of Evelyn E. Miller, and the Court being fully advised in the premises, directs the Marshal to deliver to the petitioner the body of said Evelyn E. Miller.

Thereupon, afterwards, to-wit: On the 19th day of December, 1889, the following proceedings were had in said case, as appear of record on folio 10, Journal H. of said District Court, to-wit:

In the matter of Evelyn E. Miller *habeas corpus* proceedings. } Order to execute order of yesterday.

This cause again came on to be heard on the application of Louis B. Miller, for an order to the Marshal to deliver the posession of the body of Evelyn E. Miller to the petitioner.

Thereupon, the Court being fully advised in the premises, directs the Marshal to obey the order made herein on yesterday, and to forthwith deliver custody of the child to the petitioner, Louis B. Miller.

Thereupon, afterwards, to wit: On January 24th, 1890, an affidavit of Louis B. Miler, and copies of others etc., were filed in said case, which said affidavit, etc., are in words and figures following, to-wit:

At a session of the District Court of the United States, for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court House, in the City of Omaha, on the 25th day of June, 1889, the Honorable Elmer S. Dundy, being present and presiding in said court, the following among other proceedings were had and done, to-wit:

In the matter of the proceedings in *habeas corpus* in behalf of Evelyn E. Miller on petition and application of Louis B. Miller. }

Now, on this day again, Thomas F. Burrus and Catherine Burrus, and produced the body of Evelyn E. Miller, and also having made return and answer to the writ of *habeas corpus* issued in this cause and after examining the said return and the said reply filed by the petitioner; and having the proofs and reading the depositions and hearing and considering the

arguments of the respective counsel, I find that the said Evelyn E. Miller is improperly and illegally detained and kept by the said Thomas F. Burrus and Catherine Burrus and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis B. Miller, the petitioner.

It is therefore ordered that the said Evelyn E. Miller be delivered and entrusted to the care, custody and control of Louis B. Miller; that Thomas F. Burrus and Catherine Burrus are forbidden from in any way interfering with either the said Evelyn E. Miller or Louis B. Miller in taking, receiving and assuming the care, custody and control of the said Evelyn E. Miller.

And it is further ordered and adjudged that said Thomas F. Burrus and Catherine Burrus produce the body of Exelyn E. Miller before this Court at the court room of the United States District Court, at the City of Omaha, in the County of Douglas, and State of Nebraska, within five days from the date of signing this order and adjudication.

And it is further ordered and adjudged that said Thomas F. Burrus and Catherine Burrus, his wife, pay to Louis B. Miller all costs of this proceeding by him expended in and about these proceedings, as same shall be taxed by E. S. Dundy, Jr., Clerk of the said United States District Court, and in the event of said Thomas F. Burrus and Catherine Burrus not paying said costs within said five days, it is ordered and adjudged that the said Louis B. Miller have the process of this court with the officer thereof to enforce the production and return to Louis B. Miller of the said Evelyn E. Miller as well as to enforce the collection of said costs unless the same are obeyed and carried into effect within five days from this date.

Provided that if respondents shall duly appeal from this order and give proper bond in sum of $1000.00, conditioned to produce the child in court at November, 1889, term, then the execution of this order shall be suspended during such appeal. (Signed), ELMER S. DUNDY, *Judge.*

Before Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of the proceedings in *habeas corpus* in behalf of Evelyn E. Miller on petition and application of Lewis B. Miller.

This cause again coming on to be heard, and it appearing to the Court that the appeal heretofore taken by and on behalf of the respondents to move this cause to the United States Circuit Court, and the cause again remanded to this court, and the Court having heard the arguments of counsel on motion to stay proceedings and dismiss the cause for want of jurisdiction of the Court. And the Court being of the opinion that the cause was properly in the court and before the Judge having jurisdiction of the same.

It is on this sixteenth day of December, A. D., 1889, ordered and adjudged that the stay of proceedings heretofore granted be terminated and

that the order and judgment of this court in this cause and proceedings made on the 25th day of June, A. D., 1889, be carried into force and effect.

And it is further ordered that the said Thomas F. Burrus and Catherine Burrus, or one of them, produce the said Evelyn E. Miller before this court, at the United States Court room, in the City of Omaha, Nebraska, on Wednesday, the eighteenth day of December, instant, at 10 o'clock in the forenoon.

And it is further ordered that this rule, or a copy thereof, be served on the said Thomas F. Burrus and Catherine Burrus, either personally, or by leaving a copy at their place of residences, either by the marshal of this court, or by some one by him appointed and delegated.

(Signed), ELMER S. DUNDY, *Judge.*

Before Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller.

UNITED STATES OF AMERICA.

State of Nebraska, ss:

James C. Shaw, being first duly sworn according to law, upon his oath deposeth and says, that he is a citizen of the United States and of the State of Nebraska, and a resident of said state. That he is an adult person. That he is acquainted with Louis B. Miller, Evelyn E. Miller, his child, Thomas F. Burrus and Catherine Burrus, his wife. That this deponent on the 20th day of December, A. D. 1889, was at the Union Pacific depot in the City of Omaha and State of Nebraska. That he saw said Louis B. Miller, Evelyn E. Miller, Thomas F. Burrus and Catherine Burrus at and near said place on said day. That as said Louis B. Miller was about to take the train for the east at that point, and while near said train, he reached down and took said Evelyn E. Miller in his arms when Thomas F. Burrus and Catherine Burrus caught hold of the said child and held on to her and thus resisted said Louis B. Miller in his efforts to take the said child to and upon said train. That thereupon a crowd gathered and a policeman took hold of said child and put her upon said train, said Thomas F. Burrus, Catherine Burrus and Louis B. Miller boarding the same train and proceeded to the Transfer depot at Council Bluffs, in the State of Iowa, with said child; while at said Transfer depot as said Louis B. Miller was about to board a train with his said child, to take them to his home in Ohio, he took hold of his said child, put her in his arms, when said Catherine Burrus and Thomas F. Burrus caught hold of and held on to said child and while said Miller was proceeding to said train with said child in his arms, and while said Thomas F. Burrus and Catherine Burrus were resisting said Miller in his efforts to board said train, said Catherine Burrus struck said Miller on the head and neck with her fists. Said Thomas F. Burrus and Catherine Burrus, with the assistance of other persons to this deponent unknown, pulled said Evelyn away from said Louis B. Miller

and took her upon a train on another railroad at said Transfer depot and said train pulled away with said Thomas F. Burrus and Catherine Burrus, having with them in their custody said child, Evelyn E. Miller.

JAMES C. SHAW.

Subscribed and sworn to before me this 16th day of January, A. D. 1890.

[SEAL.] DAVID H. RICHARDS,
Notary Public.

Before Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller.

UNITED STATES OF AMERICA, *ss:*

Louis B. Miller being duly sworn, deposeth and saith, that he is the petitioner in this case, to whom was awarded the custody and control of said Evelyn E. Miller, his daughter, by the judgment, order and decree of the Hon. E. S. Dundy, Judge as aforesaid.

That the original order, as well as all other orders in this case made, were made in open court, with full knowledge and cognizance of the said Thomas F. Burrus and Catherine Burrus, his wife. And that the same were either made by said Judge while both of said respondents were before the said Judge, or else that such order or certified copies thereof were served on said respondents prior to the 19th day of December, A. D. 1889. And deponent saith that both the orders of the said Judge, one dated the 25th day of June, A. D. 1889, and the other dated the 16th day of December A. D. 1889, copies of which are hereto attached, were made by said Judge, in the presence of both the said Thomas F. Burrus and Catherine Burrus, and that they well knew and understood the same, and promised deponent and his counsel that they would obey the same.

Deponent further saith, that on the morning of the 20th day of December, last past, this deponent was ready and desirous of receiving the said Evelyn E. Miller, who was then still in costody and control of the said Thomas F. Burrus and Catherine Burrus, and taking the said Evelyn with him to his home in Ohio.

That on the morning of the said day, he called at the Hotel Derby, at which place the said Thomas F. Burrus and Catherine Burrus, his wife, had been keeping said Evelyn for some days prior thereto, and demanded the said child from said Thomas F. Burrus and wife; that they declined and refused to give said child over to deponent at that time and place, but said they would deliver her to him at Council Bluffs; that although deponent had carriage at hotel, in which he and Eva might be taken to depot to commence their journey to Ohio, yet he yielded to their request and solicitations; that he shortly after went to the depot, and so to the Union Transfer Depot at Council Bluffs, and there met the said Thomas F. Burrus and Catherine Burrus with Evelyn E. Miller in their custody; that he had

procured transportation, and was ready to take the train to Chicago, over the Rock Island Rail Road, on his way to his Ohio home; that when he desired to take Evelyn from Thomas F. Burrus and Catherine Burrus, they refused to deliver her over to him as they had been ordered by the Judge to do, and as they had faithfully promised this deponent and his counsel they would do, and that when he attempted to take her from them they resisted his attempts, holding and pulling the said Evelyn from him. The said Catherine Burrus assaulted and struck this deponent in the back and across the head and shoulders, in order to make him let go his hold on said Evelyn, and that finally they seized the said Evelyn and together took her and boarded a train of cars standing near, being a train on another line of rail road, and took the said child away to some place to this deponent unknown, and have since kept her away from this deponent, contrary to his wishes and against the orders in this cause heretofore made.

Deponent further saith that said Thomas F. Burrus and Catherine Burrus were aided and abetted in their interference and action toward this deponent by divers persons, most of whom were to this deponent unknown.

That many of such persons he knows by sight but not by name, some of whom he saw present before the court at the time of the making and promulgating of the orders restoring to deponent the custody of the child, and many of whom, as deponent well knew, were fully aware of the orders in this cause made.

Deponent saith that by reason of the acts and conduct of said Thomas F. Burrus and Catherine Burrus, aided and assisted by such other persons, he has been deprived of the care, custody and control of his child, contrary to his express wishes and desires, and has been prevented and is unable to carry out the orders of the Judge in this cause made. That ever since said twentieth day of December, A. D., 1889, this deponent has been and is now desirious of receiving said Evelyn Miller, and ready to take said Evelyn Miller into the custody and control of this deponent and to provide said Evelyn Miller with a comfortable home in Ohio, and with good and sufficient clothing, board, can educate and support in deponent's said home in Ohio and further affiant saith not. LOUIS B. MILLER.

Sworn to before me and subscribed in my presence this twentieth day of January, A. D., 1890. HENRY HOOPER,

[SEAL.] *U. S. Commissioner.*

Upon the back of said affidavit of Louis B. Miller and copies of orders, etc., endorsements appear in words and figures following, to-wit. Before Hon. E. S. Dundy, Judge of the United States District Court, District of Nebraska.——In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller.——Affidavit of Louis B. Miller and copies of orders, etc., filed January 24, 1890.——E. S. Dundy, Jr., clerk.

Thereupon, afterwards, to-wit: On the 31st day of January, 1890, a rule to show cause, etc., was filed in said case, which said rule is in words and figures following, to-wit:

Before the Hon. E. S. Dundy, Judge United States District Court, District of Nebraska.

In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller on petition of Lewis B. Miller.

It coming to the attention of the court, by means of affidavits and other proofs presented on behalf of Louis B. Miller, the above petitioner, that the respondents, Thomas F. Burrus and Catherine Burrus, have disobeyed the several orders of the court, in the above case before made, of which orders and decrees the said respondents, Thomas F. Burrus and Catherine Burrus, had notice and that they, the said Thomas F. Burrus and Catherine Burrus, have failed and refused to deliver the said Evelyn E. Miller to the care, custody and control of her father, the said petitioner, Louis B. Miller; and have interfered with and prevented the said Louis B. Miller from taking, receiving and caring for her, the said Evelyn E. Miller; that on the twentieth day of December, 1889, when the said Louis B. Miller was about to take the said Evelyn E. Miller with him to his home in Ohio, they, the said Thomas F. Burrus and Catherine Burrus (with the aid and assistance of others who were conspiring with the said Thomas F. Burrus and Catherine Burrus to disobey and disregard the orders and decrees of this Court in the above case heretofore made) did take and tear away her, the said Evelyn E. Miller, from the said Louis B. Miller, and did take and remove her to some place at that time unknown to said petitioner, and hath ever since that time kept and detained her, the said Evelyn E. Miller, from her father to whom and to whose care she was awarded. And it further appearing that the order made in this cause on the 24th day of January, A. D. 1890, has not been served.

It is therefore, on this thirty-first day of January, A. D., 1890, ordered that the said Thomas F. Burrus do show cause on Monday, the third day of February, next, at 2 o'clock in the afternoon, or as soon thereafter as the same can be heard by the Court, at the rooms wherein are held the Federal Court in the City of Lincoln, in said state of Nebraska, why he, the said Thomas F. Burrus, should not be attached and punished for contempt of Court and disobedience of the orders and decrees thereof in this case heretofore made.

And it is further ordered that at the said time and place he produce the said Evelyn Miller before this court.

And it is further ordered that this order or a copy thereof be served upon the said Thomas F. Burrus either personally or by leaving at his place of residence, within two days from the date of making thereof.

ELMER S. DUNDY, *Judge.*

Upon the back of said rule to show cause, etc., endorsements appear in words and figures following, to-wit: 423 H. Before Hon. E. S. Dundy, Judge, United States District Court, District of Nebraska. In the matter of the *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition

of Louis B. Miller. Rule to show cause, etc., filed January 31st, 1890. E. S. Dundy, Jr., Clerk, John Schomp, Att'y, petitioner.

Thereupon, afterwards, to-wit: On the 3rd day of February, 1890, an answer of Thomas Burrus to the rule to show cause, was filed in said case, which said answer is in words and figures following, to-wit:

In the District Court of the United States, for the District of Nebraska.

In the matter of Evelyn Miller *ex parte* in petition for *habeas corpus.*

The answer of Thomas F. Burrus to the rule to show cause why he should not be attached for contempt.

In this cause a rule having on the 31st day of January, A. D. 1890, issued out of said court commanding Thomas F. Burrus to appear on Monday, the 3rd day of February, 1890, at 2 o'clock in the afternoon before said court, at the United States Court Room in the city of Lincoln, Nebraska, to show cause why he should not be attached for contempt for violating a judgment entered in said cause ordering the delivery of the child, Evelyn Miller, to the said Louis B. Miller, and restraining said Thomas F. Burrus from interfering with the custody of the said Louis B. Miller of said child, and also commanding the said Thomas F. Burrus to produce the said child before the court, under the pains and penalties of the law. The said Thomas F. Burrus respectfully shows to the Court that pursuant to said judgment entered in said *habeas* proceedings, the said child Evelyn Miller was delivered by the United States Marshal for the District of Nebraska, in whose custody she had been committed by the order of the court, to said Louis B. Miller on or about the 19th day of December, A. D. 1889. That after the Marshal had delivered the child Evelyn Miller to the custody of the said Louis B. Miller, the said Louis B. Miller permitted the child to remain with this respondent and Catherine Burrus, grandparents of the child, until such time as the said Louis B. Miller could take his departure to his home, in the State of Ohio. That on account of the illness of the child and the severe shock to her system, caused by the contention and litigation in reference to who should take her in custody, the said Louis B. Miller was unable to leave the City of Omaha for his home for two or three days. Subsequently by mutual arrangement entered into between the said Thomas F. Burrus and the said Louis B. Miller, both the said Louis B. Miller and this deponent and his wife, together with the child took the Union Pacific dummy in the City of Omaha, Nebraska, for the Transfer station in the City of Council Bluffs, in the State of Iowa, accompanied by a number of people whose sympathies had been aroused and excited in behalf of the grandparents and the reluctance of the child to depart with Louis B. Miller. After arriving at the Transfer station in Council Bluffs, without any previous knowledge of respondent or understanding having been entered into by this respondent with any of the people assembled at the station, this respondent and his wife, and the said Evelyn Miller were suddenly pushed

onto a train then about to depart, and were carried away to Malvern, in the State of Ohio, where they remained for several days until the child by rest and seclusion recovered her health. Since that time the child has remained in the custody and control of this respondent and his wife, Catherine Burrus, until a short time since, when she left with respondent's wife, Catherine Burrus, for a visit in the State of Iowa, and is at the present time with respondent's wife, Catherine Burrus, in said State, and respondent is unable to produce her in court at the present time.

Respondent with all due respect to the court, by way of mitigation of his offense, if the court be of opinion that the said judgment or decree has in fact been violated, would respectfully show that he has been advised by several counsel of competent and legal learning, members of this court, that the court was wholly without jurisdiction to make the order and enter the judgment directing the said child to be delivered to said Louis B. Miller, and in view of the statement made by the court at the time said judgment was entered that doubt existed in his own mind as to the jurisdiction of the court; he has felt that the proper course for him to pursue to decline to produce the child in court at the present time, and the said Thomas F. Burrus respectfully show to the court under advise of counsel that it is wholly without jurisdiction either of the subject matter or of the person of this respondent and the said child Evelyn Miller and the judgment of the court is null and void, or if not void, it was fully satisfied when the marshal delivered the child to Louis B. Miller.

As a matter of mitigation, if the court be of the opinion that it clearly had jurisdiction to enter the judgment in question, the respondent shows to the court that he and his wife have had the custody, control and management of the child for nearly eight years, and have nursed, provided for and educated it to the best of their ability, and have now for it so deep and abiding affection, that they feel that the loss of the child will be to them an unbearable burden.

Wherefore respondent prays that said rule to show cause why he should not be attached for contempt and produce the said child before the court be discharged.

THOS. F. BURRUS.

STATE OF NEBRAKSA,
County of Lancaster, *ss.*

Thomas F. Burrus being firstduly sworn on oath, says, that he is the respondent in the above entitled action and proceedings, that he has read the foregoing answer, and the matters and facts set forth therein are true.

THOMAS F. BURRUS.

Subscribed in my presence and sworn to before me, this 3rd day of February, 1890. E. S. DUNDY, JR., *Clerk.*

[SEAL]

Upon the back of said answer, endorsements appear in words and figures, following, to-wit——423 H. In the District Court *ex parte* Evelyn Miller

——Answer of Thomas Burrus to the rule to show cause. Filed February 3, 1890. E. S. Dundy, Jr. Clerk. G. M. Lambertson, Attorney for respondent.

Thereupon, afterwards, to-wit: On the 5th day of February, a commitment was filed in said case, which said commitment is in words and figures, following, to-wit:

In the United States District Court, of the District of Nebraska.

Before Hon. E. S. Dundy, Judge of said District Court, sitting as Judge and holding said court in the court room, in the city of Lincoln, Nebraska, on Wednesday, the———day of February, in the year of our Lord, one thousand eight hundred and ninety.

In the matter of the contempt of Thomas F. Burrus.

Whereas, on this fifth day of February, A. D. 1890, in open court, and in the presence of Hon. Elmer S. Dundy, Judge of the said United States District Court, for the District of Nebraska, came Thomas F. Burrus, who having been brought before this court on a rule to show cause heretofore issued by this court on the thirty-first day of January, A. D. 1890, commanding and directing the said Thomas F. Burrus, on Monday, the 3rd day of February, A. D. 1890, at the rooms wherein are held the Federal Court in the city of Lincoln, in Nebraska, he do show cause why he, the said Thomas F. Burrus, should not be attached for contempt of court and disobedience of the orders and decrees of this court heretofore made, in a certain cause before said court, then and heretofore pending, the same being in the matter of the *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller, her father, and wherein the said Thomas F. Burrus and Catherine Burrus were respondents—of all of which the said Thomas F. Burrus had due and legal notice. And it appearing that the said Thomas F. Burrus and Catherine Burrus forcibly took and kept the said Evelyn E. Miller from said Louis B. Miller who was attempting to take her to his home in Ohio, and did take her to some place in Iowa, and have refused ever since to deliver her to the said Louis B. Miller; but keep her away from Louis B. Miller contrary to the former orders, judgments and adjudications of this court.

And the said Thomas F. Burrus was also ordered to produce the said Evelyn E. Miller before this court, at the same time and place.

And it being made to appear that said rule to show cause and said order to produce the said Evelyn E. Miller before this Court and Judge at said time had been duly and legally served on said Thomas F. Burrus.

And he, the said Thomas F. Burrus, coming before said Court and Judge on said Third day of February, A. D. 1890, and showing nor offering no good and sufficient reason or excuse for his disobedience of the former orders, decrees and adjudications of this Judge and Court in the aforesaid cause made and served upon him, the said Thomas F. Burrus, under and by direction of this Court.

And the said Thomas F. Burrus still refusing to obey said orders, decrees and adjudications of this Court—and still refusing to obey the said orders and to produce the said Evelyn E. Miller before this Court at this time, as he had been directed.

And the said Thomas F. Burrus not offering nor showing any legal or proper excuse for his disobience to the former orders, judgments and decrees of this Court in this cause heretofore made; nor any good and sufficient reason or excuse for not producing the said Evelyn E. Miller before the Court at this time; but the said Thomas F. Burrus coming before this Court and Judge and defying the orders, decrees and adjudications thereof, and refusing to obey the mandates thereof.

And the Court and Judge on the said 3rd day of February, A. D. 1890, having adjourned the consideration of this matter until the 5th day of February, A. D. 1890, at same hour and place, to which time and place the said Thomas F. Burrus was directed to be and appear.

And now, on this 5th day of February, A. D. 1890, pursuant to such adjournment before Hon. E. S. Dundy, Judge of said United States District Court, and in open court held in the court room at Lincoln, again came the said Thomas F. Burrus, and still refusing to obey all of said orders, decrees and adjudications of said court, in the aforesaid proceedings made and decreed and still refusing to produce the said Evelyn E. Miller, and neither offering nor showing any proper, reasonable or legal excuse for such disobedience and refusal, but wilfully and stubbornly resisting and disobeying all of said orders, decrees and adjudications.

Now, therefore, be it ordered and adjudged by this court, that the said Thomas F. Burrus, by reason of said acts and disobedience, was and is guilty of contempt of the authority of this court, committed in its presence on this 5th day of February, A. D. 1890, as well as by other acts of disobedience of him, the said Thomas F. Burrus, to the former orders, decrees, adjudications and mandates of this court heretofore made, and of which he had due and legal notice, and while he, the said Thomas F. Burrus, was in said court.

And it is further ordered that for said acts of contempt, committed in the presence of this court, as well as for his disobedience to the former orders, decrees and adjudications of this court in this case made, the said Thomas F. Burrus be punished by imprisoned for the term of three months.

And it is further ordered that this judgment be executed by imprisonment of the said Thomas F. Burrus in the county jail of the County of Douglas, in the State of Nebraska, until the further order of this court, but not to exceed said term of three months.

And it is further ordered that said Thomas F. Burrus pay the costs of these proceedings, and all costs that may accrue therein by reason thereof.

And it is further ordered that a certified copy of this order under the seal of the court, be the process and warrant for executing this order.

ELMER S. DUNDY, *Judge.*

Upon the back of said commitment, endorsements appear in words and figures following, to-wit: Before Hon. E. S. Dundy, Judge of the U. S. District Court, District of Nebraska. In the matter of *habeas corpus* proceedings in behalf of Evelyn E. Miller, on petition of Louis B. Miller, proceedings in contempt by Thomas F. Burrus. Commitment filed February 6th, 1890. E. S. Dundy, Jr., Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, E. S. Dundy, Jr., Clerk of the District Court of the United States for the District of Nebraska, certify that the above and foregoing is a correct transcript of records and proceedings in the matter of the *habeas corpus* proceedings in behalf of Evelyn E. Miller as the same now appears of record, and on file in my office.

Witness my hand and seal of said Court, at Omaha, this 27th day of February, 1890. E. S. DUNDY, JR., *Clerk.*

[SEAL.]

10 Orig

FILED
MAR 10 1890
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT

OF THE

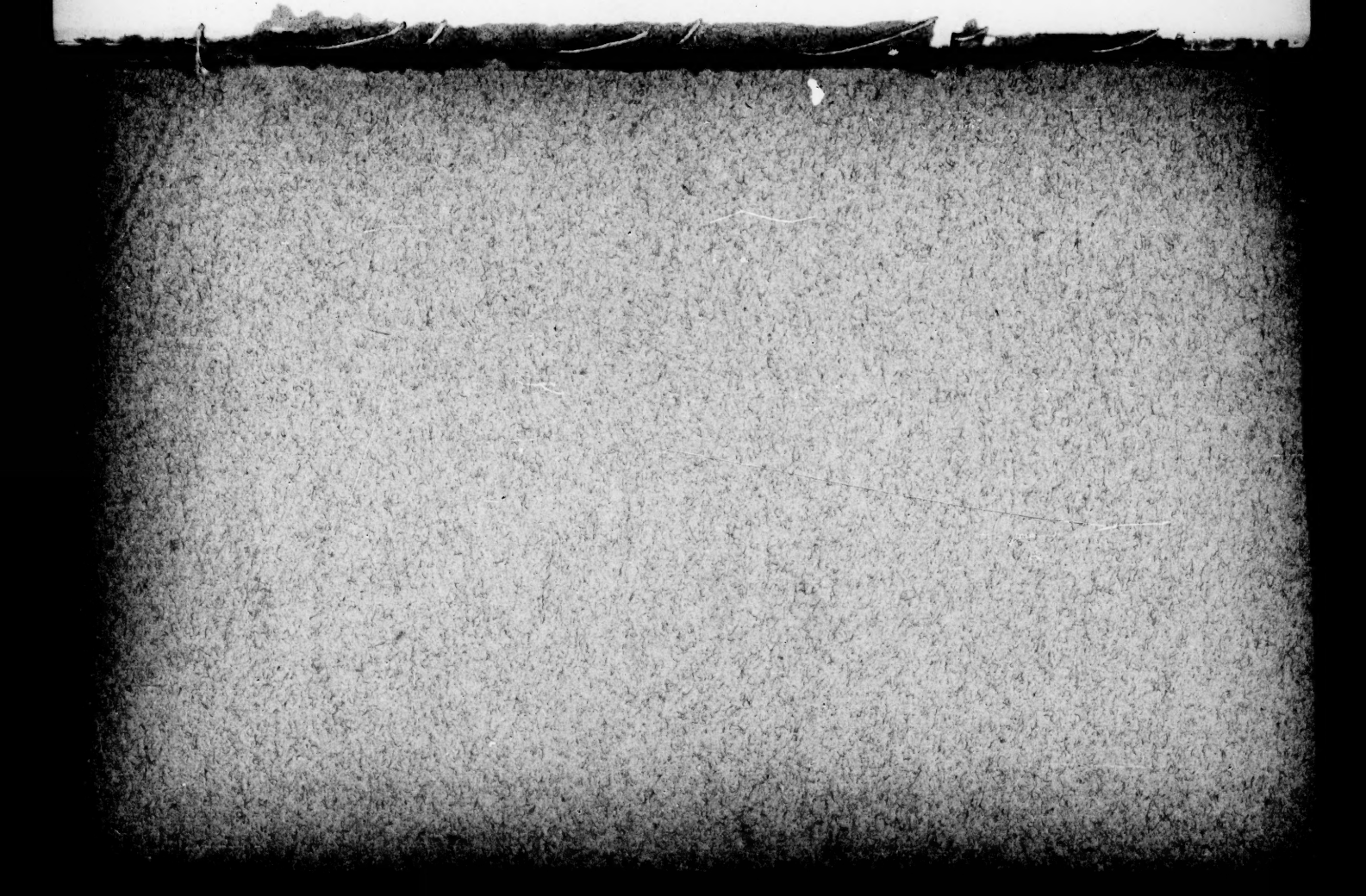
UNITED STATES.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE IN PETITION FOR HABEAS CORPUS.

BRIEF FOR PETITIONER.

G. M. LAMBERTSON.
Attorney for Petitioner.

LINCOLN PAPER HOUSE, PRINTERS.



IN THE

Supreme Court of the United States.

IN THE MATTER OF THOMAS F. BURRUS, EX PARTE IN PETITION FOR HABEAS CORPUS.

BRIEF FOR PETITIONER.

The facts upon which this application is based are fully set out in the petition of Thomas F. Burrus, and need not be repeated here. It is sufficient to state that petitioner, a resident of the state of Nebraska, was ordered in a habeas corpus proceeding instituted by one Lewis B. Miller, a resident of the state of Ohio, in the District Court of the United States for the District of Nebraska to deliver to said Lewis B. Miller the grandchild of this petitioner; that petitioner declined to comply with the order and judgment of the Court, and was adjudged guilty of contempt, and imprisoned in the county jail of Douglas County, Nebraska, for the period of three months.

I.

The District Court was without jurisdiction in either the habeas corpus or contempt proceedings.

It is not claimed that the jurisdiction of the Court in the habeas corpus proceedings instituted on the suggestion of Lewis B. Miller against the petitioner herein rest upon any

of the provisions of Section 753 of the Revised Statutes, which provides that the writ may issue for the purpose of inquiring into the cause of the restraint of liberty, where the prisoner is in custody under or by authority of the United States, or in custody in violation of the Constitution or laws of the United States.

It is, however, asserted that the District Court had cognizance of the case by virtue of the Constitution and laws conferring jurisdiction on the Courts of controversies between citizens of different states.

First. It is not a controversy between citizens of different states, either within the meaning of the Constitution or the laws conferring jurisdiction on the Court.

The petition does not allege that Mr. Miller is a citizen of a different state from that of Mr. Burrus. It alleges that Miller is a resident of Ohio, and Burrus and wife of Nebraska. But this does not meet the requirements of the law.

In Robertson v. Cease, 7 Otto, 646, it was held: 1. That "Where the jurisdiction of a Court of the United States depends upon the citizenship of the parties, such citizenship, *not simply their residence*, must be shown by the record. Looking, then, at the pleadings, and to such portions of the transcript as properly constitute the record, we find nothing beyond the naked averment of Cease's residence in Illinois, which, according to the uniform course of decisions in this court, is insufficient to show his citizenship in that state. Citizenship and residence, as often declared by this Court, are not synonymous terms."

Parker v. Overman, 18 How. 137.
Godfrey v. Terry, 7 Otto, 171.
Jackson v. Ashton, 8 Peters, 148.
Spear on Fed. Judiciary, 145.

There being no allegation in the petition that Miller was a citizen of a state different from that of Burrus and his wife, and no such fact appearing in the record, there is a fatal jurisdictional defect.

It is proper to state to the Court that since the preparation of the application of petitioner I find that after the judgment had been entered in said action, and at a subsequent term, the Court permitted the counsel for Lewis B. Miller to interline in his petition an allegation that the said Lewis B. Miller was a citizen of the state of Ohio, and the said Thomas F. Burrus a citizen of the state of Nebraska. This averment is denied by the answer, and no proof was offered on the point. Hence, I think my argument, if of any value, not impaired by this post-judgment amendment.

(a) It is to be further considered that the real person interested in this controversy is the child, and in that view the contention is between parties of the same state.

Section 754, Revised Statutes of the United States, provides that the application for the writ shall be "signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained."

It is manifest that within the meaning of the statute the person suffering a privation of liberty is the real party in interest on one side, and those imposing the restraint on the other side of the controversy. The mere fact that the writ issues at the suggestion of some other person does not

make such other person the real party to the record. The suggestion of illegal restraint can be made as well by any one in as out of the state, who sympathizes with the oppressed. In point of fact as well as in a legal sense, however, the real party plaintiff of record is the state or nation of which the party is the subject. The writ runs in the name of and from the state or the United States. It is the high prerogative writ of liberty issued by the state for the deliverance of its subjects suffering a restraint of freedom. Hence, we find these cases always entitled Ex parte Bull, or In re Turtle, United States v. Green, showing that in the eyes of the courts they are not regarded as private contentions.

In the case of Ex parte Barry, 7 Law Reporter, 374, being a case almost identical with this upon the facts, the Court say:

"A procedure by habeas corpus can in no legal sense be regarded as suit or controversy between private parties. It is an inquisition by the government at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign."

Hurd on Habeas Corpus, 152.

(b) The controversy is not, in a legal sense, one between the father and grandparents as to the custody of the child, but the question is the rights of the child; all other questions are collateral and subsidiary. The court looks almost wholly, if not solely, to the interests of the child, closing its eyes to the claims and demands of others. In a habeas corpus sense, if I may use the term, the question involved is the right of the child to her liberty, not the rights of the

parent or grandparent to the child. Keeping in mind the history of this great writ, the causes that led to its creation, and the purposes for which it has always been used, it seems to be out of harmony with the idea that it was devised or intended as an instrument for the settlement of private disputes and litigation.

In the case of Ex parte Everts, 1 Bond, 205, the Court say: "That this was the writ contemplated by the authors of the Constitution in the clause which prohibits its suspension except in certain emergencies, is quite obvious. They could have no reference to the writ as used to relieve from either actual or constructive restraints or imprisonments of the person resulting from the relations of master and servant, guardian and ward, parent and child, or husband and wife. It was doubtless intended to protect against those invasions of personal liberty which are perpetrated under color of legal or official authority. The framers of the Constitution had in view those outrages and usurpations which characterized the worst periods in the history of the British nation, by which the personal liberty of the citizen was invaded from political considerations, but with the forms of legal authority. As a remedy for such abuses of power and disregard of legal and constitutional rights, the judges of the Courts of the United States are invested with the authority to issue the writ of habeas corpus and inquire into the cause of commitment."

Its object and chief end seems to be the protection of the individual against the encroachment and aggression of the crown or government, and should be confined in the National Courts to restraints of liberty done under the authority or color of authority of the government, or in violation of its laws.

Hence the Court in Ex parte Barry, just quoted, say: "It is difficult to see how such jurisdiction can be conferred upon a Court of the United States without a material modification of the common-law idea of the writ; for it was neither designed for nor is it now adapted to the litigation of controverted matters between private parties. Questions of that kind do, it is true, sometimes arise in the course of the proceeding, but, strictly speaking, they arise only collaterally."

Hurd on Habeas Corpus, 152.

That the question or controversy in a habeas corpus case like this is not the question whether the parent or grandparent shall have the child, is clear from the definition of the writ given by the Supreme Court in Ex parte Tom Tong, 108 U. S. 559: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil rights of personal liberty. The proceeding is one instituted by himself for his liberty."

"The office of the writ is not to recover possession of persons detained, but simply to free them from illegal restraints on their liberty." Church on Habeas Corpus, Sec. 439.

Chancellor Walworth, in People v. Mercein, 8 Paige, 55, announces as the correct rule: "A writ of habeas corpus, ad subjiciendum, however, is not, either by the common law or under the provisions of the Revised Statutes, the proper mode of instituting a proceeding to try the legal right of the party to the guardianship of an infant."

To the same effect Chancellor Kent, 4 Johns. Chap. 80: The Court, in the exercise of its discretion, disposes of the child as incidental to the question of its illegal restraint.

To quote from Chancellor Walworth again, in People v. Mercein, 8 Paige, 56: "In the exercise of such a discretion, however, the natural rights of parents to the custody of their infant children are not wholly to be lost sight of by the Court or officer before whom the writ is returnable." In other words, the right to the custody of the child is not the main controversy, but a subsidiary issue.

We may then conclude that this is not a controversy between citizens of different states within the meaning of the Constitution.

(c) But even if the judicial power of the United States extends to a controversy of this kind, has that power been conferred by Congress upon the Federal Courts? The Federal Courts are only empowered to try money controversies when the amount in dispute is $2,000. From the beginning, the Circuit Courts, as to controversies between citizens of different states, have been confined to the consideration of those of a pecuniary value. Is it not conclusive that when Congress in express words names a power conferred by the Constitution, and pursuant thereto enacts a law giving effect to the words recited, that such an act limits the extent of the jurisdiction of the Courts in the exercise of such constitutional powers? And where Congress has done this for a hundred years, is not this equally conclusive that the interpretation put by Congress upon the word "controversy" is a money controversy only? Congress has conferred the power on the Courts to hear and determine "all suits of a civil nature at common law, or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars." Is this not an implied inhibition upon the Courts taking cognizance of a controversy without a pecuniary value?

In a similar case, Ex parte Everts, 1 Bond, 197, the Court say:

"Section 11 of the act of 1789 gives the Courts original cognizance concurrently with the State Courts of all civil rights at common law and in equity when the plaintiff is citizen of a state other than that in which suit is brought, and the matter in dispute exceeds five hundred dollars. But this does not include a proceeding by habeas corpus, for the plain reason, if there were no other, that the matter in controversy has no pecuniary value, and cannot be estimated in money.

This argument is made stronger in its application to the District Court because jurisdiction of controversies between citizens of different states is not bestowed on District Courts.

Kurtz v. Moffit, 115 U. S. 487.
Barry v. Mercien, 5 How. 103.
Rosenbaum v. Bauer, 120 U. S. 450.

(d) The control of the domestic relations, marriage, divorce, and the custody and guardianship of children are peculiarly within the domain of the State Courts and generally controlled by state enactments. Hence, Judge Betts, in Ex parte Barry, supra, held: "That a Circuit Court of the United States could not exercise the common law functions of parens patria, and had no common law jurisdiction over the matter set forth in the petition."

Hurd on habeas corpus approves this doctrine: "As to the first point decided above, the opinion of the judge will probably be held eventually to express the true view of the law."

This was one of the reasons that led the Supreme Court, in Barber v. Barber, 21 How. 187, to say: "We disclaim altogether any jurisdiction in the Courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery or as an incident to a divorce, a vinculo, or to one from bed and board."

Mr. Justice Daniels, in the same case, says, p. 202: "It is not in accordance with the design and operation of a government having its origin in causes and necessities political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals, and habits, and affections, or antipathies, of the members of every household."

"The federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which these families form part, and is essential to the order and to the very existence of such communities."

II.

The Federal Courts have jurisdiction in habeas corpus only in those cases when a person is restrained of his liberty by authority or under color of authority of the United States, or held in custody in violation of the Constitution and laws of the United States.

That eminent law writer, Judge Cooley, in his work on Constitutional Limitations, page 421, says: The protection

of personal liberty is, for the most part, confided to the state authorities, and to the State Courts; the party must apply for relief on habeas corpus when illegally restrained. There are only a few cases in which the Federal Courts can interfere, and those are the cases in which either the illegal imprisonment is under pretense of national authority, or in which this process becomes important or convenient in order to enforce or vindicate some right or authority under the Constitution or laws of the United States."

It must be remembered that the Federal Courts have no common-law jusisdiction. We may look to the common law for a definition of the writ; but the power of the Courts to issue the writ must be conferred by Congress within the limits imposed by the Constitution.

The only mention of the writ of habeas corpus in the Constitution is in these words. "The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

The 14th section of the judiciary act, 1789, provided: "That the Courts of the United States shall have power to issue writs of scire facias, habeas corpus, and other writs not especially provided for by statutes which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law. And that either of the Justices of the Supreme Court, as well as Judges of District Courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that the writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some

Court of the same, or are necessary to be brought into Court to testify."

The Court in Ex parte Dorr, 3 How. 103, held that the proviso limited the right to issue the writ to the cases mentioned in the proviso, namely, when the person was in custody under or by color of the authority of the United States. I quote from the opinion of Mr. Justice McLean: "The power given to the Courts in this section to issue writs of scire facias, habeas corpus, etc., as regards the writ of habeas corpus, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some Court of the same, or is necessary to be brought into Court to testify.' This is so clear from the language of the section that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction, and that they qualify and restrict the preceding provisions of the section is indisputable."

Judge Leavitt, in Ex parte Everts, supra, construing the above section of the judiciary act, decides: "The first clause of Section 14 of the judiciary act of 1789, which provides that the Supreme, Circuit, and District Courts of the United States 'shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary to the exercise of their respective jurisdictions and agreeable to the usages and principles of law,' does not authorize said Court to issue habeas corpus unless it is necessary in aid of jurisdiction in a case of proceeding there pending."

"The case of a father claiming the custody of an infant

child is not one in which a habeas corpus can issue by a Court of the United States, as ancillary to the exercise of its jurisdiction, under the above cited clause of the act of 1789."

Sections 751 and 752, Revised Statutes, with slight modifications, are taken from the fourteenth section of the judiciary act quoted above. Section 753 stands in the relation of a proviso to the other sections, embodying as it does the proviso quoted above from Section 14 of the judiciary act, with some amendments.

As the proviso in the section from the judiciary act really defined the extent of the power of the Courts to issue the writ, so Section 753 limits and defines the extent of the jurisdiction of the Federal Courts to issue the writ at the present time. The only difference is that the proviso has been broadened and liberalized by successive amendments, as experience suggested and necessity demanded. Under the section of the judiciary act recited, the Courts could only take cognizance of prisoners in custody under or by color of the authority of the United States, unless it was necessary to bring a prisoner into Court to testify. The Courts now have the additional right to issue the writ in the case of persons in custody for an act done or committed in pursuance of a law of the United States, in the case of a person in custody in violation of the Constitution or law of the United States, and in certain cases where the person is in custody for an act done under the authority or sanction of some foreign nation.

Chief Justice Chase, in Ex parte Yerger, 8 Wallace, 101, recites the various acts of Congress conferring the power on the Courts to issue the writ, in these words: "As limited

by the act of 1789, it did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some Court of the United States, or required to be brought into Court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended—first in 1833, to prisoners confined under any authority, whether state or national, for any act done or omitted in pursuance of the law of the United States, or of any order, process, or decree of any judge or Court of the United States; then in 1842, to prisoners being subjects or citizens of foreign states in custody under national or state authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867, to all cases where any person may be constrained of liberty in violation of the Constitution or of any treaty or law of the United States."

It is manifest from this statement that the right to issue the writ is confined to persons in custody under or in violation of federal authority.

This is apparent from the language used in the act of 1867, 14 Stat. 385: "The said justices or judges to whom such application shall be made shall forthwith award a writ of *habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States.*"

Chief Justice Chase in construing the act of 1867, in Ex parte McCardle, 6 Wall, p. 325, uses the following language: "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every Court

and of every judge every possible case of privation of liberty contrary to the national Constitution, treaties, or laws. It is impossible to widen this jurisdiction." Why is it impossible to widen this jurisdiction? The clear answer must be that the restriction in the Constitution prevents. This view has received the sanction of an able writer on constitutional law, Judge Cooley, who, after reviewing the several acts of Congress, uses the language attributed to him in another part of this brief, and concludes with these words: "These are the cases in which the national Courts and judges have jurisdiction of this writ; in other cases the party must seek his remedy in the proper state tribunal."

Cooley on Constitutional Limitations, 424.

It is significant that the Supreme Court has never exercised this jurisdiction. In Ex parte Barry, 2 How. 65, the jurisdiction was decided on the ground that the Court was without original jurisdiction. When the case came to them again by appeal, jurisdiction was again declined, on the ground that the Court had no appellate jurisdiction, the controversy not being a money controversy. The fact that the jurisdiction here claimed has never been exercised or declared to exist by the Supreme Court, that only one circuit judge has ever held that the jurisdiction exists, while two have held directly to the contrary, is suggestive of a doubtful jurisdiction on the part of the United States Courts.

The failure of Congress to provide an appeal from the decision of the District and Circuit Courts in habeas corpus cases, save when a federal question or authority is involved, supports the argument that the writ can only be issued by the Federal Courts in those cases where the illegal imprisonment is under pretense of governmental authority, or is

necessary to vindicate some right or authority conferred by the Constitution or laws of the United States.

It not being claimed that the case in question comes within either of the five classes of cases embraced in Section 753 of the Revised Statutes, the Court was without jurisdiction. "Without jurisdiction the court cannot proceed in any case. Jurisdiction is the power to declare the law, and where it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause."

Ex parte McCardle, 7 Wall, 514.

If the Court was without jurisdiction, the order to Thomas F. Burrus to deliver the child to Lewis B. Miller was a nullity, and the petitioner was guilty of no contempt in disobeying it, and therefore should not longer be restrained of his liberty.

G. M. LAMBERTSON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

IN RE

THOMAS F. BURRUS,

ON PETITION FOR WRIT HABEAS CORPUS.

BRIEF IN SUPPORT OF ORDER COMMITTING FOR CONTEMPT.

JNO. SCHOMP,

Of Counsel.

IN THE UNITED STATES SUPREME COURT.

In the matter of the Habeas Corpus proceedings, in behalf of THOMAS F. BURRUS. In contempt of orders and judgments of HON. E. S. DUNDY, Judge U. S. District Court, District of Nebraska.

BRIEF IN SUPPORT OF ORDER OF COURT COMMITTING FOR CONTEMPT.

Thomas F. Burrus was adjudicated to be in contempt of Court by the following order or decree:

"In the United States District Court, of the District "of Nebraska—Before Hon. E. S. Dundy, Judge of said "District Court, sitting as Judge and holding said Court "in the Court-room, in the City of Lincoln, Nebraska, "on Wednesday, the day of February, in the year "of our Lord one thousand eight hundred and ninety."

"*In the matter of the contempt of Thomas F. Burrus.*

"Whereas, on this fifth day of February, A. D. 1890, in "open Court, and in the presence of Hon. Elmer S. "Dundy, Judge of said United States District Court, for "the district of Nebraska, came Thomas F. Burrus, who, "having been brought before this Court on a rule to

" show cause heretofore issued by this Court on the " thirty-first day of January, A. D. 1890, commanding " and directing the said Thomas F. Burrus, on Monday, " the third day of February, A. D. 1890, at the rooms " wherein are held the Federal Court in the City of Lin- " coln, in Nebraska, he do show cause why he, the said " Thomas F. Burrus, should not be attached for con- " tempt of Court and disobedience of the orders and de- " crees of this Court heretofore made, in a certain cause " before said Court, then and heretofore pending, the " same being in the matter of the habeas corpus pro- " ceedings in behalf of Evelynn E. Miller on petition of " Louis B. Miller, her father, and wherein the said " Thomas F. Burrus and Catherine Burrus were re- " spondents—of all of which the said Thomas F. Burrus " had due and legal notice.

" And it appearing that the said Thomas F. Burrus " and Catherine Burrus forcibly took and kept the said " Evelynn E. Miller from said Louis B. Miller, who was " attempting to take her to his home in Ohio—and did " take her to some place in Iowa, and has refused ever " since to deliver her to the said Louis B. Miller—but " kept her away from said Louis B. Miller, contrary to " the former orders, judgments and adjudications of this " Court.

" And the said Thomas F. Burrus was also ordered to " produce the said Evelynn E. Miller before this Court " at the same time and place.

" And it being made to appear that said rule to show " cause and said order to produce the said Evelynn E. " Miller before this Court and Judge at said time, had

" been duly and legally served on said Thomas F. " Burrus.

" And he, the said Thomas F. Burrus, coming before " said Court and Judge on said third day of February, " A. D. 1890, and showing nor offering no good and suffi- " cient reason or excuse for his disobedience of the for- " mer orders, decrees and adjudications of this Judge and " Court in the aforesaid cause made and served upon " him, the said Thomas F. Burrus, under and by direc- " tion of this Court.

" And the said Thomas F. Burrus still refusing to " obey said orders, decrees and adjudications of this " Court—and still refusing to obey the said orders, and " to produce the said Evelynn E. Miller before this Court " at this time, as he has been directed.

" And he, the said Thomas F. Burrus, not offering nor " showing any legal or proper excuse for his disobedience " to the former orders, judgments and decrees of this " Court in this cause heretofore made; nor any good and " sufficient reason or excuse for not producing the said " Evelynn E. Miller before the Court at this time; but the " said Thomas F. Burrus coming before this Court and " Judge and defying the orders, decrees and adjudica- " tions thereof and refusing to obey the mandates " thereof.

" And the Court and Judge on the said third day of " February, A. D. 1890, having adjourned the considera- " tion of this matter until the fifth day of February, " A. D. 1890, at same hour and place, to which time and " place the said Thomas F. Burrus was directed to be " and appear.

"And now, on this fifth day of February, A. D. 1890, "pursuant to such adjournment before Hon. E. S. "Dundy, Judge of said United States District Court, and "in open Court held in the Court-room at Lincoln, again "came the said Thomas F. Burrus, and still refusing to "obey all of said orders, decrees and adjudications of "said Court in the aforesaid proceedings made and de-"creed, and still refusing to produce the said Evelynn E. "Miller, and neither offering nor showing any proper, "reasonable or legal excuse for such disobedience and "refusal, but wilfully and stubbornly resisting and dis-"obeying all of said orders, decrees and adjudications.

"Now, therefore, be it ordered and adjudged by this "Court, that the said Thomas F. Burrus, by reason of "said acts and disobedience, committed in its presence "on this fifth day of February, A. D. 1890, as well as by "other acts of disobedience of him, the said Thomas F. "Burrus, to the former orders, decrees, adjudications "and mandates of this Court heretofore made, and of "which he had due and legal notice, and while he, the "said Thomas F. Burrus, was in said Court, was, and is, "guilty of contempt of the authority of this Court.

"And it is further ordered that for said acts of con-"tempt, as well as for his disobedience to the former "orders, decrees and adjudications of this Court in this "case made, committed in the presence of this Court, "the said Thomas F. Burrus be punished by imprison-"ment for the term of three months.

"And it is further ordered that this judgment be exe-"cuted by imprisonment of the said Thomas F. Burrus "in the county jail of the County of Douglas, in the

"State of Nebraska, until the further order of this "Court, but not to exceed said term of three months. "And it is further ordered that said Thomas F. Burrus "pay the costs of these proceedings and all costs that "may accrue therein by reason thereof.

"And it is further ordered that a certified copy of "this order under the seal of the Court, be the process "and warrant for executing this order.

"(Signed) ELMER S. DUNDY,
Judge."

It appears by this order of adjudication, (and it is a fact), Thomas F. Burrus was in court, and there personally present. The adjudication having been made, it is not in the power of this Court in these proceedings, to review the judgment or question the wisdom of the committing Court. Parenthetically we would say that it would afford us much pleasure if such examination could be made in this case, in order that the wisdom, the justice and the magnanimity of the Judge holding said court, might receive the judicial approval of this Court.

And that the strong and forceful language of the committing Court might receive your sanction in as strong terms of potent adjudication as it has elsewhere received the approval of all law abiding and judicial respecting persons who heard it, or were aware of the circumstances and acts that called it forth from the learned Judge who was forced to impose the sentence of the Court.

It is settled in this Court, *in re.*

Ex Parte Terry, 128 U. S. 306, as well as
Ex Parte Robinson, 19 Wall. 505-511, and
Ex Parte Kearney, 7 Wheat, 38-43

that this Court can deal only with such defects in the proceedings—under which commitment was ordered—as do *render them absolutely void.*

Anything that is simply irregular or erroneous cannot be considered by this Court.

This strips the case of the consideration of every fact, and of every consideration of law, except the one question of jurisdiction in the proceedings under which this contempt was committed.

IF THOMAS F. BURRUS WAS BEFORE JUDGE DUNDY, JUDGE U. S. DISTRICT COURT, IN A CASE COGNIZANT BEFORE SUCH COURT, THE COURT'S PROCEDURE CANNOT BE ADJUDICATED OR REVIEWED, AND THE COMMITMENT FOR CONTEMPT IN DISOBEDIENCE TO ORDERS OF THE COURT AND IN PRESENCE OF THE COURT MUST BE UPHELD.

It was in power of the Court:

U. S. REVISED STATUTES, SECTION 725 and the same principle is held *in re Morris*—In Kansas Reports—also reported in *18 Pacific 171.*

DID THE COURT HAVE JURISDICTION OF THE CASE AT THE TIME OF MAKING THE ORDER—THE DISOBEDIENCE OF WHICH WAS THE CONTEMPT OF COURT?

The writ of habeas corpus in behalf of Evelynn E. Miller, sued out by Louis B. Miller, against Thomas F. Burrus was properly issued by his Honor Elmer S. Dundy, U. S. District Court Judge for District of Nebraska.

The petition was by Louis B. Miller, a citizen and resident of Ohio, in behalf of Evelynn E. Miller, his infant

child, and was directed against Thomas F. Burrus and Catherine Burrus, citizens and residents of Nebraska, who unlawfully kept and detained the said Evelynn E. Miller.

The application was made to Hon. E. S. Dundy, a Judge of U. S. District Court, by petition of Louis B. Miller, a citizen of Ohio, for a writ of habeas corpus in behalf of Evelynn E. Miller his daughter, who was illegally detained in Nebraska by Thomas F. Burrus, a citizen of Nebraska.

Judge Dundy entertained the petition, and granted the writ.

At that time, he, as a Court adjudicated on the question of his jurisdiction.

Was not that judgment correct?

United States Statutes, Section 752, gave him the power to grant the writ of habeas corpus in these words: "Section 752.—The several justices and judges of the "said courts, within their respective jurisdictions, shall "have power to grant writs of habeas corpus for the pur- "pose of an enquiry into the cause of restraint of liberty."

The section of itself applies to ALL PERSONS who are RESTRAINED of THEIR LIBERTY.

Section 753, of the U. S. Statutes, limits the power as to persons who shall not be entitled to receive the benefit of such writ of habeas corpus, and is in these words, viz: "Section 753—The writ of habeas corpus shall in no case "extend to a prisoner in jail, unless where he is in custody "under or by color of the authority of the United States, "or is committed for trial before some court thereof; or is "in custody for an act done or omitted in pursuance of a

" law of the United States, or of an order, process, or de-
" cree of a court or judge thereof; or is in custody in viola-
" tion of the Constitution or of a law or treaty of the United
" States; or, being a subject or citizen of a foreign state,
" and domiciled therein, is in custody for an act done or
" omitted under any alleged right, title, authority, privi-
" lege, protection, or exemption claimed under the com-
" mission, or order, or sanction of any foreign state, or
" under color thereof, the validity and effect whereof de-
" pend upon the law of nations; or unless it is necessary
" to bring the prisoner into court to testify."

This exception does not qualify or rule out the petitioner in this case, and no other sections of the United States Statutes seem to apply to the power of this Court in such proceedings.

If this is correct, then is the question non-debatable—It is fixed and regulated by Statutes—in language so plain it cannot be misinterpreted.

The writ of habeas corpus has in it the whole essence of the fundamental principles upon which the entire structure of our Constitutional and Statutory laws are built.

Personal liberty and personal freedom, from every *illegal restraint*, are its objects. Would it not be a travesty upon the whole system of our laws and politics, to say that there is a judicial officer under our Constitution and Laws whose position is too high, whose rank is too exalted, that he must not harken and give liberty to the most humble citizen who is improperly restrained of it?

The tendency of our National legislation has been to enlarge this power in the Federal judiciary.

The act of 1789 provided that each of the several Federal Courts should have the power to issue writs of *scire facias*, habeas corpus and all other writs not specially provided for by Statutes, which might be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law, and that either of the Justices of the Supreme Court, as well as the District Judges, should have power to grant writs of habeas corpus for the purpose of an enquiry into the cause of the commitment, provided that in no case should such writs extend to prisoners in jail, unless they were in custody under and by color of the United States, or were committed to trial before some Court of the same, or were necessary to be brought into Court to testify.

1 Statutes-at-large 81.

Later on, remember, it was found the powers granted to the Federal Courts and Judges were too confined, too limited—imperfect for the administration of justice and protection of human freedom—and the powers were extended, so that any Justice of the Supreme Court or a Judge of any District Court of the United States, in addition to such authority as already granted, should have power to grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he or they shall be committed or confined, on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order or process or decree of any Judge or Court thereof.

4 Statutes-at-large 634.

This was passed in March, 1833.

In 1842 again were the powers of the court and judge enlarged.

It was discovered that the power granted to Federal Courts and Judges was still not necessarily expanded enough to meet all emergencies that might arise—in fact, that had arisen—and additional power was given to the Federal Judges, both of the Supreme and District Court, that they should have the power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he or they being subjects or citizens of a foreign State and domiciled therein, shall be committed or confined or in custody under or by any authority or law or process founded thereon of the United States, or any one of them, for or on account of any acts done or omitted under any alleged right, title, authority, privilege or protection or exemption set up or claimed under the commission or under sanction of any foreign State or sovereignty, the validity or effect whereof depends upon the law of nations or under color thereof.

5 Statutes-at-large 539.

In 1867 a still further act was passed enlarging the powers of the Federal Courts and the Judges thereof, and giving them the powers to grant the writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States.

14 Statutes-at-large 385.

Thus had the powers of the judges been increased and their scope of authority enlarged by three different enabling and empowering acts, passed since the original

Act of 1789—each act of enlargement being the child of necessity, as demonstrated by the occurrence of actual cases demanding the use of the writ, and each time did the power of our National legislature come to the support of the principles of our American freedom and universal liberty, controlled and hampered by no power but that of obedience to law. And yet with each and all of these enlarging and enabling acts, did it seem to the wisdom of the National legislature that the restraints or the possibilities thereof had not yet been far enough removed; so in 1869 they passed still another Act, by which it seemed that no possibility of an occurrence could arise and exist by which the liberty and freedom of any might be hampered or shackled (except by due course of law) and this act embodied in the provision as incorporated in the revised statutes is as follows:

1. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.

2. The several JUSTICES and JUDGES of the *said courts* within their respective jurisdictions shall have POWER to grant writs of HABEAS CORPUS, for the PURPOSE OF AN ENQUIRY INTO THE CAUSE OF RESTRAINT OF LIBERTY.

And then having given to the courts and the judges thereof in these few terse words—that which is unlimited power in relation to the granting of the writs of habeas corpus—it makes the only exception in which they have not this power, in these words:

"Sec. 753. The writ of habeas corpus shall in no case "extend to a prisoner in jail, unless where he is in cus- "tody under or by color of the authority of the United

" States, or is committed for trial before some court " thereof; or is in custody for an act done or omitted in " pursuance of a law of the United States, or of an " order, process, or decree of a court or judge thereof; or " is in custody in violation of the Constitution or of a law " or treaty of the United States; or, being a subject or " citizen of a foreign State, and domiciled therein, is in " custody for an act done or omitted under any alleged " right, title, authority, privilege, protection, or ex- " emption claimed under the commission, or order, or " sanction of any foreign State, or under color thereof, " the validity and effect whereof depend upon the law " of nations; or unless it is necessary to bring the " prisoner into court to testify."

By every successive amendment has the power of the court and the judges been increased and enlarged.

So clearly has that been the design and the desire of the National legislature that there can be no doubt but that the last act was intended to give universal power to the courts and judges to enquire into every possible restraint of liberty that might occur within their several jurisdictions.

And when the words so plainly say, that no court will attempt to curtail their power or contract the authority thus bestowed.

Thus ends this case.

Never before has the power and authority of a Federal Court or Judge to issue the writ been questioned, (in any case not embodied within the exceptions of Section 753), since the Act of 1869 and the law as embodied in the Revised Statutes.

In re *Ex Parte Royall*, reported in 117 United States reports. In the opinion, Mr. Justice Harlan, referring to the habeas corpus Act and the power to issue the writs, declares such power to be, "in language as broad as could well be employed" and commenting upon the opinion in *Ex Parte Yarbrough*, 110 U. S. 651 and 654, uses this language:

"It would seem—whether reference be had to the act "of 1867 or to existing Statutory provisions—that it was "the purpose of Congress to invest the Courts of the "Union, and the justices and judges thereof, with power "upon writ of habeas corpus, to restore to liberty any "persons, within their respective jurisdictions, who are "held in custody, by whatever authority, in violation of "the Constitution or any law or treaty of the United "States."

And in the same opinion does the learned judge, in referring to the case of Robb vs. Connelly, 111 U. S. 624 and 637, endorse the opinion "that upon the State Courts "equally with the Courts of the Union rests the obliga- "tion to guard and force and protect every right granted "or secured by the Constitution of the United States, in "the laws made in pursuance thereof, whenever those "rights are involved in any suit or proceedings before "them."

And may it not be—is it not a fact—that many cases may arise like the one before Judge Dundy, which are properly cognizable by the Courts of the Union, or the judges thereof when brought there, that would have been equally cognizant before the State Court had the case been first commenced there.

Prior to the passing of the last Act, as now embodied in the Revised Statutes, I can find no cases similar to the one in behalf of Evelynn E. Miller, where the jurisdiction and power of a Judge of the Federal Court to issue the writ has been denied.

The only case touching on the question, as having been reported as before this Court, is the case

Ex Parte Barry, reported in 2 Howard 65,

Wherein the opinion is by Mr. Justice Story. This was an application for a writ of habeas corpus to bring up the body of the child—an infant daughter of petitioner alleged to be unlawfully detained from the petitioner, its father, and detained by the maternal grandmother.

True, the writ is denied, but expressly upon the grounds that this court had not ORIGINAL jurisdiction, and in the opinion the learned judge uses this significant language:

"No application has been made to the Circuit Court "of the United States for the District of New York, for "relief in the premises, either by writ of habeas corpus, "or *de homine replegiando*, or otherwise, and of course, no "case is presented for the exercise of the appellate juris- "diction of this court, by any review of the final decision "and award of the Circuit Court upon any such pro- "ceedings."

Does not this opinion fully convince the reader that in that case the petitioner would have had a standing in the court, if he had applied first to the Circuit Court of the United States, for the District of New York?

And that the learned judge entertained no doubt whatever, as to the right of the petitioner to have ap-

plied to and received his writ in such Circuit Court, and that the United States Circuit Court had full power to issue the writ, was to his mind, a proposition too plain to be questioned.

In case in *3d Mason 482, United States vs. Timothy Green,*

Judge Story, of the United States Supreme Court, sitting in the United States Circuit Court, of the District of Rhode Island, with Hon. J. Pitman, of the United States District Court—Judge Story delivering the opinion held, (after full argument of the case, showing the case was ardently contested) that that court had jurisdiction of the case.

This case was also a case similar to the case in behalf of Evelynn E. Miller—in very many respects.

It was the petition of Aaron Putman, a citizen of New York, against Timothy Green, a citizen of Rhode Island, to bring up the body of Eliza A. Putman, an infant daughter of Putman, about 10 years old, alleged to be wrongfully detained in the custody of the defendant, who was her grandfather.

The grandfather in that case (as in ours) refused to obey the writ and did not make full return, and in order to enforce obedience to the writ the court was preparing to take direct and positive measures to deliver the child to her father—when an amicable arrangement between parties was agreed upon.

In case reported in *1st Deady, U. S. Circuit Reports, page 299; Susan Bennett vs. Sanford J. Bennett;*

The petitioner, Susan Bennett, was a citizen of the State

of California, who filed a petition for a writ of habeas corpus, in behalf of her infant child, Anna Bennett, who was held and detained by the respondent, Sanford J. Bennett, a citizen of the State of Oregon.

In this case the question of the jurisdiction of the court was fully taken up and considered; and the learned judge writes an exhaustive opinion on the subject, beginning on page 512, of the reports, and considering the question of the jurisdiction of the court (the District Court of the United States, District of Oregon) says:

"By the Constitution, Art. III, Sec. 2, the judicial "power of the United States extends to all controversies "between citizens of different States.

"This is a controversy—a legal controversy—to be "tried and determined by judicial proceedings and judg- "ments; the controversy arises upon the alleged legal "right of the petitioner to the custody of her infant "child, and the denial and withholding of that right by "the respondent; this is also a controversy *between citi- "zens of different States.*"

The learned judge, gathering from the opinion of Ch. Justice Marshall, in *Ex Parte Bollman, 4 Cranch.* 75, from "Conkling's Treatise," 77, and from *Ex parte Barry*, 2 How. 65, as touching upon the right and power of the court to issue the writ, comes to the confident conclusion, that there can be no doubt as to the power of the U. S. District Courts to issue the writ, under the circumstances of the case; that case upon all questions of legal principle was parallel to the one under which the writ in this case was issued.

These are the adjudications directly in point, so far as

I have been able to discover them; and none dissent nor differ from the conclusion to which Judge Dundy came when he entertained this suit and issued this writ.

II.

It may be contended by the learned counsel for the petitioner (Burrus) in this case, that the case as before Judge Dundy, was not between citizens of different States.

Louis B. Miller was and is a citizen of Ohio, Thomas F. Burrus and Catherine Burrus were and are citizens of Nebraska, and Evelynn E. Miller, as the infant daughter of Louis B. Miller, was and is in law a citizen of the same State as her father.

But argued the counsel, this is not a contest between Louis B. Miller and Thomas F. Burrus and wife. If not between them, then it is between Evelynn E. Miller and Thomas F. Burrus and Catherine Burrus, and the citizenship of the infant being that of her father, the same principle of law applies, and the application of the cases cited is directly in point.

The Federal Constitution provides that Federal Courts shall have jurisdiction of suits between citizens of different States, &c., in order that the citizens of one State may not have advantage over citizens of a sister State on account of local prejudice, &c.

In the cause out of which this order of contempt arose, local prejudice was created and intensified by local press and neighborly interference, separating child from parent, denying an interview between father and daughter until the direct order of the Court made such interview

possible, calling upon employes of railroads and forcing or pursuading them to disregard rules, regulations and time cards, so as to prevent the father from taking his own, causing mayors and officials to promise in advance remission of fines and condonement from punishment to those violating the laws and interfering with the orders and judgments of the Courts in obedience to the clamor of an excited crowd, exhibiting the spectacle of an influential newspaper proselyting and abusing it . power and compromising its dignity to urge on an excited crowd almost to deeds of violence, turning its columns into a "begging bureau" to raise funds to enable litigants to defy, disregard and disobey the orders of the Judge and Court, calling with its many tongued power upon the citizens of one State to array themselves against the citizens of another, publishing in its columns open threats of violence and death to him who came in the "name of humanity and the law" and asked the protection and assistance of the law that unto him might his own be given.

Surely this case of Evelynn E. Miller, demonstrates and shows that in no other class of cases is there so much danger of local prejudice preventing the due administration of justice; and if this Court shall say that causes, wherein a father, a citizen of another State is seeking the return of his own child, shall not be heard and determined by a Federal Court, and the decrees thereof enforced by the Courts of the Union, then is the law providing the writ of habeas corpus a failure and a mistake.

And the pledge and promise of a fair trial, especially in those instances where the objects of the litigations are the most dear and cherished of all earthly desires—resto-

ration of children to parents and the recementing of family ties, is indeed an empty pledge and a broken promise; and that system of courts that will not protect and promote the family—the purest of all institutions—a myth and a mistake.

It is not in the power of Thomas F. Burrus to question the authority or the jurisdiction of Judge Dundy, as Judge of U. S. District Court, to entertain and decide the case that was before him in relation to granting the writ of habeas corpus, in behalf of Evelynn E. Miller.

The parties were before him. The petition had been filed. The respondents, Burrus and wife, had filed their answer. The reply was on file, and the case was in condition for the judge to proceed and hear the same.

Not a question was raised as to jurisdiction, as to service, as to power, as to right. It is conceded by all; and in pursuance thereof, *the parties stipulate in writing for the hearing of the case by His Honor Judge Dundy, in these words:*

"Before Hon. E. S. Dundy, Judge U. S. District Court.

"In the matter of the habeas corpus
"proceedings of EVELYNN E.
"MILLER, on application of L.
"B. MILLER.

"It is hereby stipulated that the hearing of this case "be set for Friday, May 31st, at the U. S. Court-room, in "Omaha, before Hon. E. S. Dundy; that the child, "Evelynn E. Miller, may remain in the custody of "Thomas F. Burrus and Catherine Burrus until that day, "*subject to the order of this court, nevertheless;* that either "party may have leave to take depositions of witnesses

" residing out of this State, or as provided by U. S. law,
" on the usual legal notice, to be used in said hearing
" May 13th, '89.

" JOHN SCHOMP,
" Attorney for Petitioner.
" THOMAS F. BURRESS,
" CATHERINE BURRESS,
" By E. W. THOMAS
" AND JNO. S. STULL,
" Their Attorneys."

It was in accordance with the understanding and the wishes of all parties, that the matter should be heard and determined before Hon. E. S. Dundy, Judge U. S. District Court.

The stipulation was filed and became a part of the record of this case.

Again, during the pendency of taking of evidence, it was said, openly by counsel of respondents, "They " were in the court they wanted to be, and would abide " Judge Dundy's decision."

But it may be replied, parties cannot confer jurisdiction by agreement.

This principle of law we do not controvert; we are not *conferring* jurisdiction.

This was given by the statutes of the United States, and this agreement is only acknowledging the existence of that right, which at that time both parties had cognizance of, and which each party conceded and agreed to.

This stipulation saved additional allegations. It saved proof. It ESTOPPED EITHER PARTY FROM DENYING JURISDICTION

The agreement or stipulation did not confer jurisdiction, it only admitted the existence of that right or power that the selected tribunal possessed.

In that tribunal, and before that judge, all the parties to the controversy appeared, tried the case, awaited and received the judgment and order of the judge and Court.

From its decree they filed their appeal to the United States Circuit Court, from whence they were dismissed by judgment of Judge Brewer; NOT BECAUSE they did not come FROM the PROPER Court. But because their case was one of a class of cases, which the lawmakers had declared were not to be appealed from that Court to the Circuit Court.

Sec. 763, Rev. Statutes, United States.

Does not the very fact that Congress by this Section selected certain cases in which appeal could be taken from the judgment of any Court or judge inferior to United States Circuit Court clearly indicate that there were other cases in which the writ of habeas corpus could be granted and that were not appealable, and is not this one of a class of such cases? Thus indicating, that no doubt, as to the power of the District Court or judge to issue the writ in such cases, entered the minds of the legislators.

Do not the cases specified in Sec. 763, as appealable cases, embrace all cases, that have in them strictly a so-called federal question?

If District Court could issue the writ in no other cases, then why the necessity of this specification or distinction, between cases appealable and cases non-appealable?

I am aware the learned counsel, who so ably and adroitly presented the case of Burrus, has cited some

quotations from text books by most eminent authors, who seem to have entertained other views as to the rights and powers of United States Courts,—but they were not backed by authority of adjudicated cases. And every one that I have seen were written prior to the passing of present Act of Congress giving proceedings in habeas corpus.

The case being properly one, that could be brought and heard within the jurisdiction of the judge and Court, and it having been so brought, and so heard by the judge, cannot be reviewed by these proceedings.

It was properly brought, being by petition in behalf of Evelynn E. Miller, by Louis B. Miller, her father, who claims the right to have her custody, control and education.

Such was the manner of procedure in all cases where the custody of that child is sought to be obtained by the father.

Ex parte Barry, 2 Howard 65.

Bennett vs. Bennett, 1 Deady 299.

United States vs. Green, 3 Mason 458.

Hurd on Habeas Corpus, (2nd Edition) 204.

Mercein vs. The People, 25 Wendell, 64.

Hurd on Habeas Corpus, (2nd Ed.) 454.

Where it is held that the writ may not only issue without privity of the child, but against its express wish.

The People vs. Mercein, 3 Hill 399.

Commonwealth vs. Hamilton, 6 Mass. 273.

Baird vs. Baird, 3 C. E. Green (N. J.) 195.

The matter of Keeler, before the United States District Judge in Arkansas, cited in Hurd on habeas corpus and reported in Hemp. Rep. 306, and numerous other reported cases, shows it is the clear and proper remedy for a father to obtain the custody and control of his infant child.

Thus far have we directed our attention to the legality of the proceedings in court, in the case wherein the rulings and decrees were made, the disobedience and disregard of which caused the judgment of contempt of court of which Mr. Burrus was guilty.

III.

But from another view, Mr. Burrus was guilty of contempt, is properly punished, and should not be liberated therefrom by allowance of writ of habeas corpus.

He was in presence of court and the United States District Judge.

He was there having subjected himself to the jurisdiction thereof by his own act and volition, (see stipulation)—having done this, he was obliged to submit to and obey the rulings, decrees and judgment of that court or Judge in the cause then before it and embraced in the Stipulation of Burrus.

To him there was no question of authority in the matter. *He who voluntarily submits himself to the power of the court, must obey its decrees.*

It was no time then for him to question the way and manner in which he got before the Judge. He had submitted himself and his cause to the Jurisdiction, and it was too late to question the Jurisdiction of the court, as was held in

Skillems Executors vs. Mays Mays Executors, 6 Cranch 268

in which the sylabus is in these words:

"It is too late to question the the jurisdiction of the "Court after the cause has been sent back by Mandate."

And the opinion of the court is as follows:

"It appearing that the merits of this cause had been "finally decided in this court, and that its mandate re- "quired only the execution of its decree, it is the opinion "of this court, that the Circuit Court is bound to carry "that decree into execution, although the jurisdiction of "that court be not alleged in the pleadings."

Which case and doctrine is approved in

Ex Parte Story, 12 Peters 343.

Fowler vs. Rathbone, 12 Wallace 129.

The non-observance by parties to a suit of awards, duly made by arbitrators of umpires, to whom have been submitted the determination of a case, is laid down in

American and Eng. Cyclopedia of Law, page 785, to be contempt of court.

CITING CASES.

Yeates vs. Russell, 17 John 465.

Where case had been referred by agreement in writing of attorneys, although such reference was not in accordance with act or rules of court authorizing references, it was held by Chancellor as follows:

"This agreement in writing, subscribed by the attor- "neys, was acted upon, and carried duly into effect. It "is not pretended that there was any imposition or col- "lusion in the case. It was an agreement made in good

" faith, and I think it should be truly and accurately ob-
" served.

" I am, therefore, of the opinion that a party to that
" agreement must be held to be concluded by it, and that
" he cannot now allege that the reference and judgment
" were not warranted by law. I think it would be estab-
" lishing a precedent that might be very pernicious in its
" consequences."

Not to enforce obedience by respondents Burrus and wife to order and decree of Judge Dundy, in the case before him, would be far more pernicious and dangerous in its results.

In this case it is a question that was brought to a Court of competent jurisdiction. They come before it and acknowledge the legality of the proceedings that had been taken. They consent and stipulate to a hearing and determination of the question involved; this stipulation is in writing signed by their counsel, both astute and able. In pursuance thereof, he and his counsel came day after day, in the presence of such Court, submit their evidence and argue the case fully upon fact and law. They await the judgment of the Court, and when judgment is awarded against them, then invoke the assistance of that Court, (which they now condemn and treat with contempt) for an appeal to the United States Circuit Court. In pursuance of such appeal, they go before the United States Circuit Court. By the judgment and de-decree of such Circuit Court, after hearing and full argument before the learned judge, then holding the Circuit, they and their case are remanded back to the Court from which they come—(they cannot deny the authority of the

Circuit Court to decree them and their case back to that tribunal.)

And then they came, this, the second time, according to law; and when thus before the Judge and Court, at this time, they treat him, his decrees and his judgment with contempt and utter disregard and disobedience, both in the presence of the Court and elsewhere. It is with a defiance that becomes widespread as it is heralded throughout all the country roundabout, by newspaper press, excited tongue and defiant crowd, not only disobeying the mandates of the Court, but threatening damage, danger and death to the party seeking his own child, that he may rear and educate her, and have her as his own. And then when this Court seeks to enforce its decrees against such as are within its control and adjudges him guilty of contempt, and punishes him therefor, the United States Supreme Court is asked to interfere and liberate the offender by writ of habeas corpus.

We submit the writ should not be granted to Thomas F. Burrus, and that the rule to show cause be discharged.

Respectfully submitted,

JNO. SCHOMP,

Of Counsel.

March , 1890.

Law Offices of

Schomp & Corson,

Omaha, Nebraska.